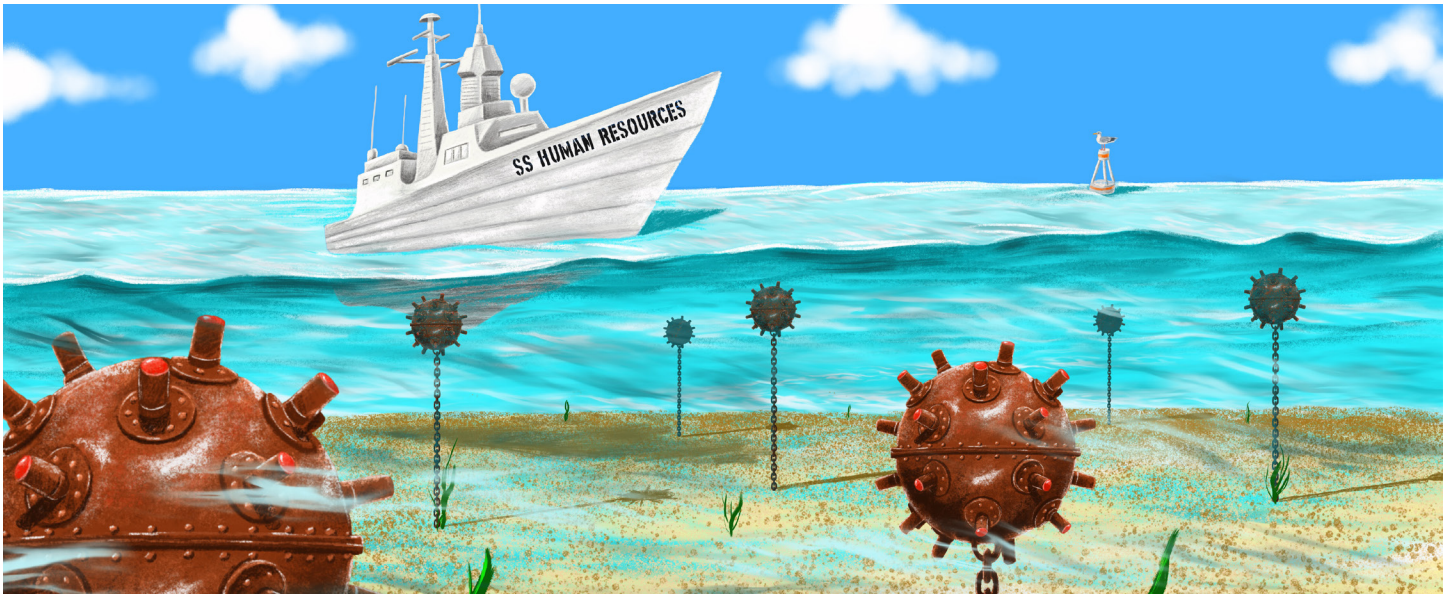


Danger Ahead! Navigating HR's Legal Minefield

As you sail through your day-to-day human resources matters, you know there are many employment laws that apply. There are nuances, however, that create a legal minefield. This article identifies some of these mines so that you are better equipped to safely navigate.

The Fair Credit Reporting Act (FCRA)

Employers who use third parties to run background checks on current or prospective employees are subject to a series of strict technical requirements under the federal FCRA. The FCRA requires, among other things, that employers disclose to employees or applicants if they are going to conduct such a background check and obtain the individual's written authorization to do so. If a background check turns up negative information, then prior to taking any adverse action against the individual the employer must provide specific notice, a copy of the background check, a summary of their rights under the FCRA, and provide them with a reasonable time to respond to the contents of the background check. If the individual does not respond, or if the employer is not persuaded by their response and decides to implement the adverse action, then an additional notice is required. Every one of these steps has detailed and technical requirements under the FCRA and its regulations. Employers can be sued for missing any one of these steps, for leaving any required information out, or even for providing too much information. And there are plaintiffs lawyers who make a living by identifying technical violations of these rules and suing the employers in class action lawsuits. Delta Airlines, for example, recently settled such a class action lawsuit for $2.3 million!

Avoid this mine by taking the time to confirm that your background check procedures are FCRA-compliant.

Title VII of the Civil Rights Act

Can a single incident of misconduct create an unlawful hostile work environment? A hostile work environment occurs when any unwelcome conduct that is based on a

protected characteristic "is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." In 2017, the federal Third Circuit Court of Appeals held that a single incident can be enough.

In *Castleberry v. STI Group*, the plaintiffs were two African-American employees who worked for an oil and natural gas company. While working on a fence-removal project, the plaintiffs' supervisor allegedly said that if they had "n***er-rigged the fence" they would be fired. The plaintiffs reported the offensive language to a superior and were fired two weeks later without explanation. The lower court dismissed the harassment claim, stating that the alleged harassment was not "pervasive and regular" enough to create a hostile work environment. The Court of Appeals reversed, clarifying that the standard is "severe *or* pervasive." Accordingly, a single, extreme act of discrimination can create a hostile work environment.

Don't ignore a harassment complaint just because there was a single incident of bad behavior. It may be enough to cause a serious legal problem.

The Americans with Disabilities Act (ADA)

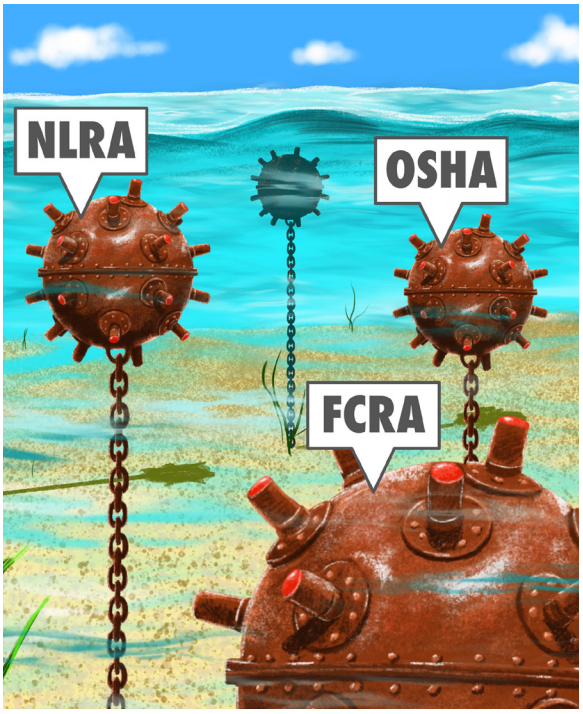
Employers may violate disability discrimination laws when they categorically deny an employee's accommodation request that involves the modification of a workplace policy. In *EEOC v. Dolgencorp LLC*, the federal Sixth Circuit Court of Appeals affirmed a $275,000 jury verdict in favor of a former sales associate. The Court found that a retail store violated the ADA when it denied outright the associate's request to keep orange juice at her cash register to help manage her type II diabetes. Following the denial, the associate suffered at least two hypoglycemic episodes while working alone with customers still in the store. Unable to excuse herself to the store's break room, she grabbed a bottle of orange juice from the store's cooler and drank it. After each episode, she paid the store the amount of the orange juice. The store's upper management terminated her employment for violating the store's grazing policy. The Court noted that the store completely failed to engage in the interactive process as required by law before denying the employee's request for orange juice.

One size does not fit all when it comes to the ADA. Employee requests for an accommodation require an interactive process. Avoid this ADA mine by granting simple accommodation requests and engaging in the interactive process for more challenging requests.

The Family & Medical Leave Act (FMLA)

It is not uncommon for employers to suspect that some employees take FMLA leave when they don't really need to. An employee who fraudulently uses FMLA leave may lawfully be terminated. But a municipal employer in Massachusetts recently learned the hard way that it should have more carefully investigated an employee's activities while on leave before terminating him. While off work on FMLA leave for foot surgery, the employee took a trip to Mexico. The employer fired him for FMLA abuse. The employee sued. It was not until *after* the employee was fired that the employer found evidence of him doing things that were inconsistent with his need for leave. Because the employer did not know of those activities *before* it terminated him, the Court upheld a $1.9 million jury verdict in favor of the employee.

Look before you leap! Promptly and thoroughly investigate any suspected FMLA fraud to avoid this mine.



The Occupational Safety & Health Act (OSHA)

An employee amputates the tip of his finger while operating a table saw—what now? There are approximately 50,000 amputations nationwide each year. When faced with an amputation injury, there are a number of federal or state occupational safety and health standards that apply. First, you must report the injury to OSHA or the applicable state agency within 24 hours of the incident. You also must record the loss of a finger (regardless of bone loss) on the employer's Form 300. Further, if any employees were exposed to bloodborne pathogens while helping the injured employee, a post-exposure follow-up is required under the bloodborne pathogens standard. In addition, depending on the proximity to outside medical help, you may be required to have someone on your staff adequately trained to render first aid with readily available supplies.

When faced with a workplace injury, avoid potential OSHA mines by identifying and complying with each of the relevant safety standards.

The Michigan Medical Marijuana Act (MMMA)

Michigan's medical marijuana laws generally do not affect an employer's ability to prohibit marijuana use or to terminate employees for positive test results. However, in *Braska v. Challenge Manufacturing et al.*, the Michigan Court of Appeals held that an employer could still be liable (indirectly through the state) for unemployment benefits.

In *Braska*, three employees, all medical marijuana cardholders, tested positive for marijuana but were not under the influence at work. The employer terminated all three employees and contested their unemployment benefits. The Michigan Court of Appeals ruled that an MMMA cardholder terminated for a positive marijuana drug test is not disqualified from receiving unemployment benefits, so long as the employee's use of marijuana is in accordance with the MMMA and the employee had not ingested or been under the influence of marijuana at work. The Court based its holding on specific "penalty" language within the MMMA's immunity clause—denying an MMMA cardholder unemployment benefits is an impermissible penalty under the MMMA.

You can terminate MMMA cardholders for positive test results, but recognize that you may still owe them unemployment benefits, unless you have documented evidence that the employee was under the influence at work.

The National Labor Relations Act (NLRA) / The Michigan Payment of Wages & Fringe Benefits Act (PWFBA)

You want to give a high performer a significant raise, but you don't want to ruffle any feathers among the other team members.

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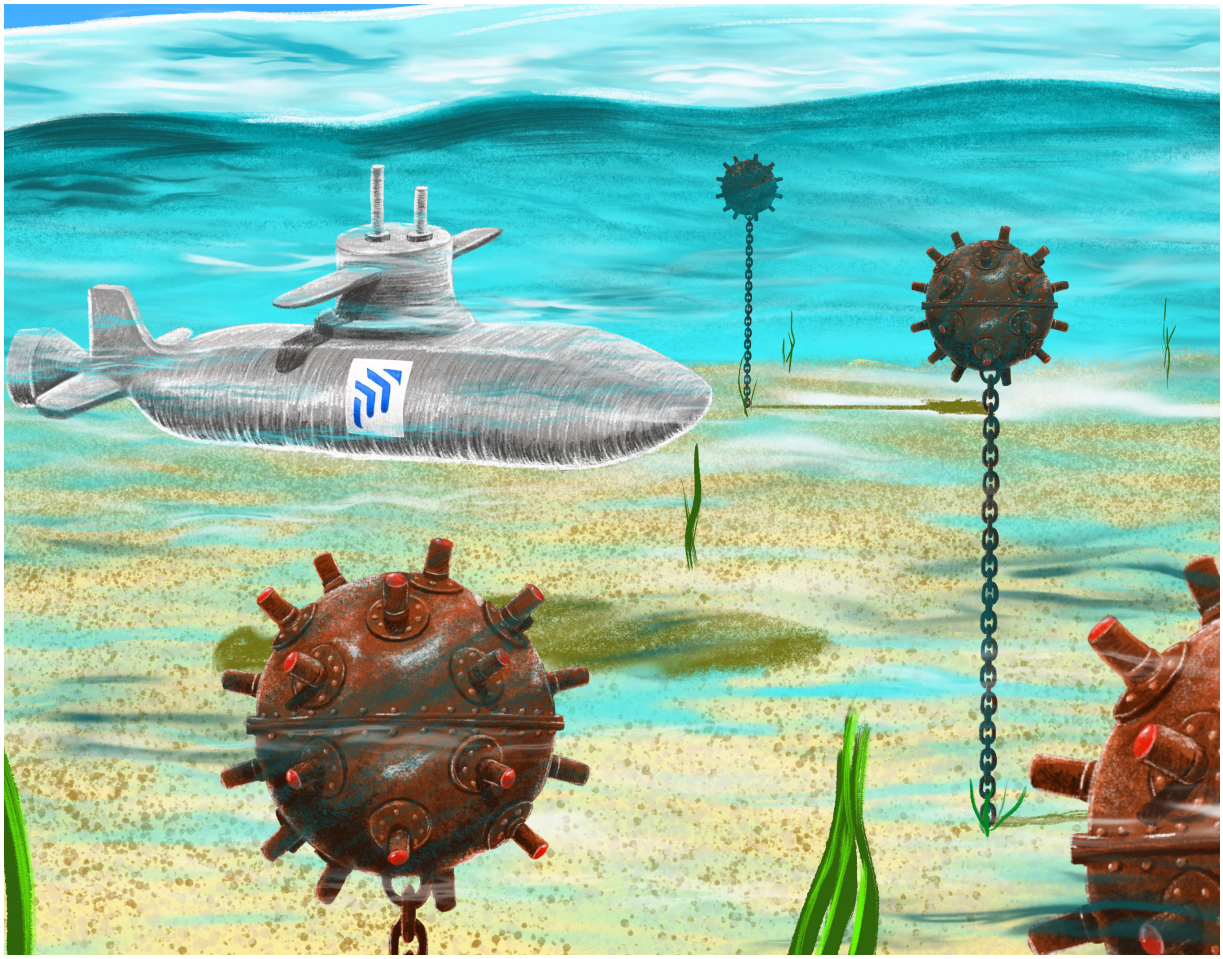
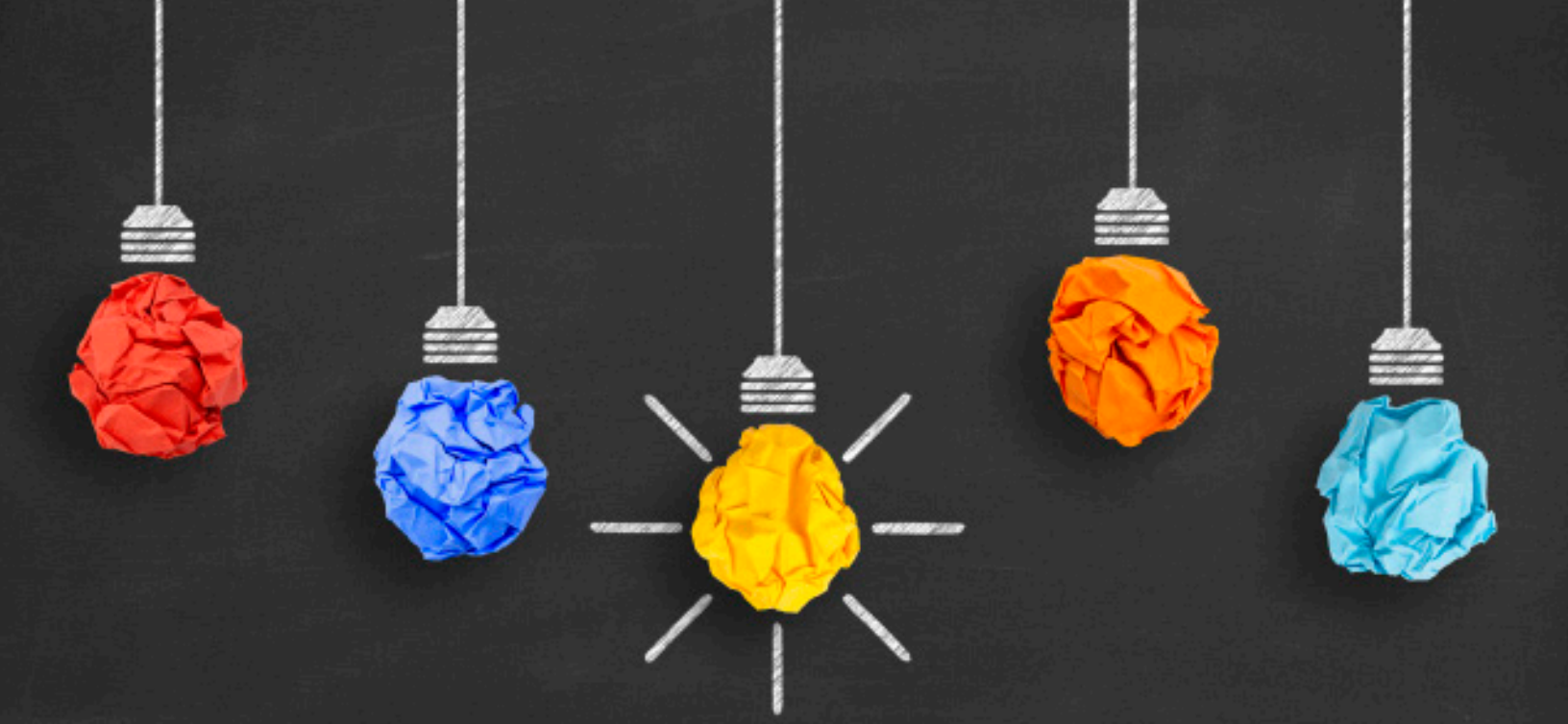
It may be tempting to swear the high performer to secrecy, or to include employee compensation as confidential information in your confidentiality policy. This is a temptation you must resist. The NLRA gives employees—including non-union employees—the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This language means that employees can discuss the issues that affect them at work, including their compensation. Further, under Michigan's PWFBA, it is a *misdemeanor* to require employees to keep their compensation confidential.

With secrecy off the table to avoid this mine, what can you do instead? Consider taking the opposite route by being transparent with your employees. Talk with each team member about the salary range for their position, the factors considered to determine compensation, and specific steps they can take to increase their individual compensation going forward.

This legal minefield highlights the importance of regular training for HR professionals, managers and supervisors. We can help you with that training. And when an employment issue requires you to navigate the minefield, be sure to call your labor and employment attorney at Warner Norcross + Judd for assistance.

This article was a collaborative effort of Warner's Labor & Employment Practice Group.





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Trends in Employee Benefits and Labor Laws

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Learn More and Register Online:
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Senior executives, business owners, in-house counsel and human resource professionals who are responsible for development of labor and benefits strategies, policies and compliance

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Midland, Oct. 1
The H Hotel
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Midland, MI 48640

Kalamazoo, Oct. 16
Radisson Plaza Hotel
100 West Michigan Ave.
Kalamazoo, MI 49007

Employee Student Loan Burden—4 Ways to Help

Mary Jo Larson
mlarson@wnj.com
248.784.5183

Jennifer Watkins
jwatkins@wnj.com
248.784.5192

We have a student debt crisis in the United States. Total student loan debt has quintupled since 2004, bringing the total to over $1.3 trillion. It is second only to mortgage debt.

As a result, many workers are delaying retirement savings. One study found that only one third of millennials are contributing to an available 401(k) plan. Who can blame them, when student loan debt is an immediate obligation and other life goals such as buying a home or starting a family are being delayed because of it. Retirement seems far off in the distant future.

But it is not just millennials. Some reports indicate that 35% of student loan debt is held by people over age 39. And many parents have taken out loans of their own to help their children through college.

So what is an employer to do? Taking a proactive approach to helping employees pay down student debt can attract and retain employees and can further benefit employees by allowing them to save more and earlier for retirement. But how?

We will discuss four programs an employer can implement, from the easiest and perhaps least desirable, to the most complex but perhaps most attractive.

1. Provide financial education and planning services.

Armed with a basic understanding of math, most people can see that saving early for retirement is a good thing. Some come to this understanding only after seeing the magic of compound interest in the classic example of Person A starting early and winding up with significantly more at retirement age than Person B, who invests more but starts later. However, even if you understand it in theory, how do you squeeze enough out of a debt heavy budget to invest?

A good financial education and planning program can help employees optimize their personal financial situation. These programs are usually not expensive for the employer. But to have even a marginal impact, you need motivated and engaged employees. Many employees will not see this as a significant enough benefit for recruiting and retention purposes.

2. Make loan payments for employees.

Some employers offer employees bonuses and other payments specifically for student loan debt. These payments can be used in strategic ways. For example, loan repayments in the form of:

- sign-on bonuses to attract talented employees
- performance-based bonuses
- bonuses for reaching service milestones, which effectively work as a retention tool

These payments are taxable to the employee and currently give no special tax benefit to the employer. Several bills have been introduced in Congress to provide tax incentives, but have not seen much traction yet.

Programs like these would be relatively easy to implement, but employers should run them by benefits counsel to make sure they do not run afoul of any tax code requirements, such as the Code Section 409A rules on deferred compensation.

3. Allow employees to "purchase" repayments with flex spending dollars under a cafeteria plan.

Some welfare plans have a "flex" dollar design, where employees can elect to "spend" their flex dollars on health care and other welfare benefits and cash out unused flex dollars. As an alternative to a cash out, the program can be structured to allow unused flex dollars to be used to repay student loans.

This benefit would be after tax, but may still be an attractive option for some employees, who may make different choices regarding their health and welfare options if they can have dollars left over to use toward loan repayments. The program can require that an employee elect at least one medical program benefit, ensuring employees do not forego medical coverage to repay loans.

Employers will want to check with benefits counsel on any kind of program like this to make sure it meets Affordable Care Act, nondiscrimination, and other requirements.

4. Make nonelective contributions to 401(k) plan when employees make loan repayments.

We saved this option for last because, while it is the most complex of the options we have mentioned, it is probably the one in which employers are most interested.

Since one of the biggest concerns surrounding student loan debt is that employees are foregoing retirement savings to pay down student loans, employers have been investigating ways to use the 401(k) plan to address the debt while encouraging savings.

Some student loan vendors have emerged, encouraging employers to add benefits to their plans that offer employees employer-funded, pre-tax contributions to the 401(k) plan if the employees make student loan repayments through the vendor's platform. It is like a match on the student loan repayments (SLR Match). The challenge in designing these programs is the Internal Revenue Code's (IRS) contingent benefit rule, which says other benefits cannot be conditioned on whether an employee makes elective deferrals (with matching contributions being a notable exception). These vendor programs offer the 401(k) contributions regardless of whether an employee is making deferrals to the 401(k) plan and getting a resulting 401(k) match. This means that an employee who makes elective deferrals and also student loan repayments would receive both the 401(k) match for the deferrals and the SLR Match for the loan repayment.

"

Since one of the biggest concerns surrounding student loan debt is that employees are foregoing retirement savings to pay down student loans, employers have been investigating ways to use the 401(k) plan to address the debt while encouraging savings.

While this is a great benefit to employees with student loan debt, many employers cannot afford to add an additional contribution to their plan, and some may even feel it is unfair to allow employees to receive both types of contributions, while employees without student debt are only receiving the 401(k) match.

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Last fall, the IRS issued a Private Letter Ruling to an employer offering a different type of plan design. The employer, Abbott Laboratories, offered a 5% 401(k) match to employees making elective deferrals of at least 2% of compensation. The proposal to the IRS was that employees could enroll in a student loan repayment (SLR) program and the employer would make a 5% nonelective contribution to the plan (SLR Match) if the employee made a student loan repayment equal to at least 2% of compensation. An employee could also make elective deferrals to the plan, but they could not receive the match on those deferrals and also the SLR Match.

The IRS said this arrangement would be acceptable, with some caveats. Although a Private Letter Ruling only applies to the employer asking for the ruling, it is a good indication of how the IRS would view this design and offers other employers the opportunity to consider similar programs.

There are some important aspects to the SLR Match program described in the ruling to note:

Must be voluntary. The SLR Match program must be voluntary and allow employees to opt out of the program prospectively.

Elective deferrals have no effect. The employee must receive the SLR Match contribution if the employee makes a student loan repayment, regardless of whether they also make elective deferrals. However, if the employee receives the SLR Match, they do not also receive a regular 401(k) match contribution.

Eligible for match if no loan payment is made. If an employee does not make a 2% student loan payment for a payroll period, but does make elective deferrals, they must receive the regular 401(k) match for that payroll period. These can be done as "true up" matching contribution after the end of the plan year. If an employee formally opts out of the SLR Match program, however, the regular 401(k) match contributions should be made each payroll period, if that is the plan's normal 401(k) match contribution schedule, and not as a true up after plan year end.

Can require employment on last day of the plan year. SLR Match contributions and any true up 401(k) match contributions can be subject to a requirement that the employee be employed on the last day of the year. Again, if the employee actually opts out of the SLR Match program, future 401(k) match contributions could not have a last day requirement unless the plan applies it to all match contributions outside the SLR Match program.

Usual plan requirements apply. The SLR Match contributions are subject to coverage and nondiscrimination testing, contribution limits, as well as eligibility, vesting, and distribution rules. Note that the SLR Match contribution would not be treated as a matching contribution for any testing requirements, but any true up 401(k) matching contributions would.

Employer cannot be the lender. The employer cannot be the lender for the student loan. In other words, an employer cannot loan money to an employee for school, and then use a program like this to encourage repayments to the employer.

No set rule on how to verify loan payments. The ruling does not mention how an employer would verify that the employee made student loan repayments. The employer could offer after tax payroll deductions from the employee's paycheck that would be transmitted directly to the lender. If the employer does not want to take on that

administration, some other kind of verification would be prudent (although not required), such as copies of repayment checks from the employee or statements from the lender showing the date and amount of payments. The employer may also wish to consider partnering with a third party vendor to verify payments and perform contribution calculations.

Matching safe harbor plans cannot do this. Absent guidance from the IRS to the contrary, matching safe harbor plans are not going to be able to implement this type of program because safe harbor matching contributions have to be made for every participant who makes the required amount of elective deferrals. A 3% nonelective safe harbor plan would not have the same issue as long as the plan continued to give the minimum 3% contribution to all eligible participants.

This ruling is welcome news for employers looking for an approach to helping employees repay student loan debt. A program like this would require review by benefits counsel as well as preparation of the necessary plan documentation. It also adds some complexities for plan testing and administering the program. But it could give employers an edge in attracting and retaining employees in this age of overwhelming student loan debt.

Attorney Spotlight:

MICHAEL WOOLEY

Michael Wooley has over 22 years of experience in employment-based immigration issues. He specializes in working with C-level corporate officers and general counsels to formulate long-term immigration strategies and short-term solutions for U.S. and international companies. He also assists clients' employees with family-based immigration matters and naturalization. A former Peace Corps volunteer in Ecuador, Mike is fluent in oral and written Spanish.

What motivated you to become an attorney?

It may sound cliché, but I've always wanted to help people. In college, I was a psychology major and did very well, but decided not to enter that field. Instead, I decided to pursue a lifelong dream and volunteered for the Peace Corps after graduation. I oversaw the construction of water systems across 25 towns near the western rain forests of Ecuador. During that time, someone mentioned to me that I would make a good lawyer based on my persuasive writing skills and problem-solving abilities. I researched what it would take to become an attorney and decided to pursue it. In Ecuador, I lived in a small town with very sporadic electricity, so I often studied for the LSAT by candlelight – an experience I'll never forget. Soon after, I attended University of Michigan Law School.

How did you get your start as an immigration attorney?

I began my legal career as a litigator. I enjoyed being in court and was successful. The fluid environment was a good fit for me. I enjoyed thinking on my feet and adapting to the unpredictable nature of the courtroom. Early in my career at another firm, a senior partner identified a missing component in his health care law practice – immigration counseling and representation. The partner offered me the opportunity to create and grow the immigration practice. I accepted and founded the immigration practice at that firm with a focus on health care and higher education and expanded it to helping families. I have worked with many of my institutional clients for over a decade now and I really enjoy understanding their needs.

How have the recent U.S. immigration developments affected employers and employees?

The laws haven't changed drastically, but now they are being enforced very rigidly. Technically, the evidentiary standards applied to cases have not changed, but the threshold amount of proof the government requires to satisfy those standards has increased dramatically. This makes immigration more restrictive and cumbersome for employers and individuals coming into the U.S. The threshold of standards is much higher and the level of scrutiny at the consulate agencies and adjudication centers is unprecedented. Also, some individuals are being affected by travel bans, but there are also increased evidence requirements for employers and employees. In addition, employers and individuals should expect substantial delays in processing. What used to take two months now can take eight months or longer.

What are best practices that employers are using to help attract talent from outside of the United States and what advice can you provide?

Employers can save resources and avoid employment disruptions by identifying hiring needs, anticipated start dates and employee travel needs much earlier than they have been accustomed to. This may not be ideal from a business perspective, but planning a year in advance is helpful. Preparing and filing immigration paperwork at the earliest possible time is key. Some immigration forms may be filed up to six months in advance of a requested start date. Employers should identify early on whether a worker has the necessary credentials to enter and work in the U.S. Employers and employees should have documentary evidence on hand well in advance of filing. Employers now need a long-range strategy for hiring foreign employees.

What is the most rewarding part of your immigration law practice?

I am passionate about being an advocate and a voice for those who need the legal services I offer and I greatly enjoy helping organizations bring valuable talent to the U.S. Also, I occasionally accept unique cases in which we have interrupted and ultimately defeated the government's attempts to deport foster children, adoptees and spouses on technicalities. We only do a few, often pro bono or for a greatly discounted fee, but those cases are a lot of fun. There is no gray area, you either win or you lose ... and we win.

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900 FIFTH THIRD CENTER, 111 LYON STREET NW, GRAND RAPIDS, MI 49503-2487

ADDRESS SERVICE REQUESTED

LABOR AND EMPLOYMENT

Edward Bardelli*	616.752.2165	Dean Pacific*	616.752.2424
Andrea Bernard*	616.752.2199	Steven Palazzolo	248.784.5091
Kelsey Dame	616.752.2519	Johnny Pinjuv	231.727.2655
Gerardyne Drozdowski*	616.752.2110	Louis Rabaut	616.752.2147
Robert Dubault	231.727.2638	Kaitlin Sheets	616.752.2564
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DeAndre' Harris	616.752.2331	Elisabeth Von Eitzen*	616.752.2418
Angela Jenkins	616.752.2480	Michael Wooley	989.698.3715
Jonathan Kok*	616.752.2487	B. Jay Yelton III*	269.276.8130
Matthew Nelson*	616.752.2539		

EMPLOYEE BENEFITS

Katy DeVillez	616.752.2782
Stephanie Grant	248.784.5068
Anthony Kolenic, Jr.	616.752.2412
Norbert Kugele	616.752.2186
Mary Jo Larson	248.784.5183
Heidi Lyon	616.752.2496
Brianna Richardson	616.752.2558
Kent Sparks	616.752.2295
Justin Stemple	616.752.2375
Jennifer Watkins	248.784.5192
Lisa Zimmer	248.784.5191

** Litigators*