Student Loan Sidebar

info@christiearkovich.com

Now that President Biden's 10k-20k student loan forgiveness plan has been rejected by the U.S. Supreme Court, borrowers are getting ready to resume payments in October. The Court gave a clear signal that it will not approve universal debt relief in its June 30, 2023 decisions in *Department of Education, et al. v. Brown*, 22-535 and *Biden, et al. v. Nebraska*, 22-506.

In *Brown*, a unanimous Court found that the two nonqualifying students lacked standing to bring suit. Students argued that the Department should not use the HEROES Act and instead should rely on the Higher Education Act for debt forgiveness.

The *Nebraska* case was filed by six GOP-led states. The Court found that the HEROES Act allows the Secretary to waive or modify existing requirements, but cannot rewrite the statute to create a new program cancelling debt.

> *New Programs in Bankruptcy are Expected to Provide Individualized Rather than Universal Relief*

The Higher Education Act of 1965 authorizes the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand." 20 U.S.C. 1082(a)(6). It is anticipated that the Biden administration will put forth an alternative plan under the Higher Education Act that will likely impact the presidential election in 2024. Ultimately, this pathway is presumed to meet the same fate before the U.S. Supreme Court.

So, what is a borrower/debtor to do now? There remains $1.77 trillion in education debt in the United States.

Fortunately, as the payment pause expires early this Fall, with both payments expected to resume in October 2023 and interest accruing on September 1, 2023, there are many improvements and new pathways to provide forgiveness or discharge.

New SAVE IDR plan: The new Saving on a Valuable Education ("SAVE") IDR (income-driven repayment) plan is being promoted by the Department as both a new and improved income-driven plan as all borrowers in REPAYE (Revised Pay As You Earn) will be shifted into SAVE. The key elements of SAVE are:

- Reduction to 5% of discretionary income payment for undergrad loans (from 10% under the current REPAYE);
- An increase in the poverty level deduction for expenses from 150% under the current REPAYE to 225% under SAVE;
- Exclusion of a spouse's income if separately filed tax returns (not a feature of REPAYE)
- Additional interest subsidy
- Forgiveness of loan balances after 10 years of payment for those with original balances of $12,000 or less.

Not all of SAVE will go into effect when the payment pause ends this fall. But most, including the interest subsidies, the ability to file a separate tax return, and the 225% of poverty guidelines will go into effect July 30, 2023. Anyone with undergrad loans will see a marked reduction in the payment when the 5% begins (July 2024). Anyone who previously filed a joint tax return may wish to reconsider that filing status in early 2024 to analyze whether filing separate will decrease student loan payments over and above any tax ramifications.

Soft Start to Payments: Due to an On Ramp process, there will be no adverse credit reporting or referral to collection agencies for one year – although interest will accrue during the year.

Auto Enrollment: Those on REPAYE before or during the COVID forbearance, will be automatically enrolled in SAVE.

Avoidance of Future Default: A default in federal student loan payments damages a borrower's credit. It also allows for a 25% penalty to apply, and authorizes severe collection activities including 15% wage garnishment, 15% social security offset, and seizure of tax refunds. To help avoid unintentional defaults, the Department will auto enroll any borrower in SAVE after 75 days delinquency if the borrower has previously linked his or her studentaid.gov account with the IRS. This step is normally done during the IDR process.

IDR Waiver Begins. Beginning August 13, 2023, the Department will begin to forgive loan balances under the IDR Waiver rules. Notifications went out to 804,000 borrowers that they will have $39 billion in federal student loans automatically discharged in the coming weeks. Anyone who still has the older Family Federal Education Loans under FFELP should consider consolidation to the Direct Loan program to get in line for this one-time fix:

- to allow prior forbearances exceeding 12 consecutive months or 36 months cumulative to

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qualify under IDR;
- Back door fix to PSLF (can change loan type to Direct to qualify for PSLF)
- All loans will be re-dated to the earliest repayment date (very beneficial for those with bifurcated education)
- All payments count toward PSLF to determine 120 payments;
- Consolidation does not restart the IDR count as it normally would.
- Many deferments count toward IDR.
- After application of the above one- time fix, loans that have been in repayment for 20 years (undergraduate) or 25 years (graduate) will be automatically forgiven.

PSLF Expansion to Contract Workers: Public Service Loan Forgiveness has been expanded to include individuals who work in public service as a contract employee for a qualifying employer in a position or providing a service which cannot be funded or provided by a direct employee under state law.
TPD Discharge Relaxed Rules:
- Automatic now for those who are approved for SSD or VA disability;
- Three-year post-discharge income monitoring no longer required;
- Certification not just limited to MD or DO – expanded July 1, 2023 to include nurse practitioners, physicians assistants (PAs) and psychologists.

Parent Plus Loans: While Parent Plus borrowers do not qualify directly for SAVE, there is a path for a borrower to double consolidate their Parent Plus loans to qualify. A normal consolidation will allow a Parent Plus borrower to qualify for Income-Contingent Repayment(ICR), but at a much higher rate than would be permitted under SAVE. Section 685.209(c)(5)(iii) was implemented by the Department to provide that a Direct Consolidation loan made on or after July 1, 2025, which repaid a Parent Plus loan or repaid a consolidation loan that at any point paid off a Parent Plus loan, is not eligible for any IDR plan except ICR. So that's the deadline – there are two years left to double consolidate Parent Plus loans to qualify for anything other than ICR. However, a borrower will likely be much better off to do the double consolidation as soon as possible this fall so that the loans are all re-dated to the earliest loan repayment date, and to prevent any prior payments from being waived under IDR under the normal consolidation rules which will restarted on January 1, 2024.

New Programs in Bankruptcy are Expected to Provide Individualized Rather than Universal Relief:

DOJ Attestation Adversary Process underway: the DOJ intends for the new DOJ Guidance Process established in November 2022 for any pending or future case to be user-friendly and avoid time consuming and expensive litigation. The three-prong Brunner test still applies. Attestation focuses on a debtor's present, future, and past circumstances. Certain rebuttable presumptions that the inability to repay will persist if:
- The debtor is 65 or older;
- The debtor has a disability or injury impacting income potential;
- The debtor has been unemployed for at least 5 of the last 10 years;
- The debtor failed to obtain the degree for which the loan was procured;
- The debtor's loan has been in repayment status for 10 years.

The presumptions are not the only basis for satisfying an undue hardship. The undue hardship discharge program is only available for Direct Federal Loans. It is suggested that debtors seek relief through available programs and consolidate to Direct loans before filing bankruptcy.

New BK IDR plan: Section 685.209(k)(4)(iv)(K) was revised to provide that the Department will award credit toward IDR forgiveness for months where the Secretary determines that the borrower made payments under an approved bankruptcy plan. While the regs have not yet come out, this change is expected to be significant. While a process exists to allow for IDR treatment for payments made on Federal Student Loans during bankruptcy, the process is convoluted and often not understood by many including debtors, debtors' attorneys, and loan servicers. Also, this may be an avenue for relief for those with Parent Plus or Grad loans who may be facing unaffordable payments under the IDR programs.

The information in this Sidebar does not, and is not intended to, constitute legal advice. For a consultation, email info@christiearkovich.com or call 813.258.2808.