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Viewpoint: The new tax law, #MeToo, and unintended consequences



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As the dust settles from the recent legislative collision between the #MeToo movement and tax reform, it is the proponents of the #MeToo movement that are left scratching their heads and crying foul. In what was intended to help shine a spotlight on, and assist in the eradication of, workplace sexual harassment, the 2017 Tax Cuts and Jobs Act includes language prohibiting the deductibility of any settlements or payments related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement and attorney's fees related to such settlements or payments.

While the language in the act provides a disincentive for employers to use nondisclosure agreements in the settlement of sexual-harassment claims, employees are also penalized – unfairly so. The statute singles out and places a financial burden on employees subjected to sexual harassment that is not placed on employees subjected to other unlawful conduct. For example, employees who are subjected to other forms of discrimination, such as unlawful pay disparity based on gender bias, may deduct their attorney's fees regardless of whether their settlement agreements contain an NDA.

Furthermore, this language in the act may impede the resolution of employment cases, including by affecting both financial terms (in other words, the actual value of the settlement factoring in tax consequences) and non-financial terms (i.e., the scope of any confidentiality or non-disclosure terms).

This becomes particularly challenging when there are multiple claims at issue, such as both unlawful pay disparity and sexual harassment. How does one draft an NDA to apply to one claim but not the other? Is the payment to resolve the unequal pay claim somehow "related to" the sexual harassment? How does one apportion the attorney's fees

between the two claims? How will the IRS treat this apportionment?

In late December 2017, U.S. Sen. Robert Menendez, D-New Jersey, who proposed the notion of using Section 162 to help shine a light on unlawful conduct, called on Congress to do something. As he said, "It has come to my attention that when the final bill was written, language was inserted that does not reflect my legislative intent, at best has led to confusion, and at worst will inadvertently lead to sexual-misconduct victims being further victimized."

However, no action has been taken to date. Until Congress acts to correct these unintended consequences, negotiating over these issues only increases the attorney's fees, further penalizing the employee.



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