



U.S. Tax Reform Denies Deductions for Confidential Sexual Harassment Settlements

The recently enacted tax reform bill includes a provision that significantly affects how employers settle sexual harassment claims. Section 13307 of the Tax Cuts and Jobs Act provides that no deduction is permitted for settlements subject to nondisclosure agreements and paid in connection with sexual harassment or abuse. Specifically, no deduction is allowed for "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."

The provision applies to amounts paid or incurred after December 22, 2017, and effectively requires employers to choose between nondisclosure and deductibility.

This new law leaves two primary questions unanswered for employers. First: Are other claims covered by a settlement "related to sexual harassment or sexual abuse," thus making payment for those claims also nondeductible? Since a case may involve numerous legal claims, where appropriate, employers may consider allocating the payment between those claims pertaining to sexual harassment or abuse and any other claims. This may enable employers to deduct portions of the settlement not allocable to the sexual harassment claims, and potentially a portion of any attorney's fees incurred in connection with such other claims.

Second: Does the loss of deductibility also apply to attorney's fees incurred by the plaintiff? The plain language of the provision—"attorney's fees related to such a settlement or payment"—appears to include fees incurred by both the defendant and plaintiff. Accordingly, until further guidance is issued, employers should take this into consideration when agreeing to pay a plaintiff's fees. Even where plaintiffs will bear their own attorney's fees, requiring nondisclosure may affect their willingness to settle, or the terms of such settlement, to the extent such fees may have otherwise been deductible.

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