

# Tax Bill Cuts Deduction for Confidential Sexual Harassment & Abuse Settlements

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on January 3, 2018

On December 22, 2017, the Tax Cuts and Jobs Act was signed into law as P.L. 115-97. Hidden about halfway into the law, in Section 13307, is an amendment to the tax code on itemized deductions for individuals and corporations. Generally, current law permits employers to treat the costs of settlement payments and related attorney's fees as a tax deductible business expense. However, the recent amendment eliminates the deduction in certain situations, stating:

No deduction shall be allowed under this chapter 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. (26 USC 162(q)).

This change applies to any payments made after December 22, 2017, including payments for settlements that occurred prior to this date.

The result of this amendment is that business must weigh their desires to (a) deduct the settlement as a business expense, versus (b) keep allegations and settlement of sexual harassment/abuse claims confidential. Employers may have been willing to pay more for an agreement with a non-disclosure provision, but the inability to deduct the settlement may be changing this calculus.

Interestingly, **the amendment applies only to sexual harassment/abuse related settlements in for-profit businesses** – it does not impact settlements:

- Related to race, religion, age, disability, other civil rights-type causes of action, employee benefits claims, breach of contract, or other employment related claims.
- For tax exempt enterprises (that do not have such deductions to take), or
- For government agencies (that do not pay federal taxes).

The IRS and courts will be left to clarify the nature and extent of this amendment, including (i) what “related to” means; (ii) whether part of a settlement can be confidential if there are multiple causes of action (e.g., sex and age harassment);

(iii) whether attorney's fees may be apportioned between investigation, evaluation, multiple claims, etc. to allow for a deduction if the final result is a confidential, sexual harassment related settlement agreement.

#### What this means for your business:

Of course, the best position to be in is to prevent claims in the first place. Seek the advice of employment counsel for effective preventative measures. At a minimum, employers must conduct regular antidiscrimination/anti-sexual and other harassment training (bullying, too, in some states), and ensure that employment policies, reporting procedures and the like remain up to date.

But if there is a claim of sexual harassment and/or abuse for which a business decides to settle, the business will be left to determine whether a tax deduction or confidential settlement is more important, and how to handle related issues.

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