

EMPLOYER BEWARE: New Tax Bill Requires Full Disclosure of Sex Harassment Settlements or... Lose the Business Expense Deduction

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In the Tax Cuts & Jobs Act, congress in its infinite wisdom, determined to publically shame or, alternatively, financially burden companies that settle claims of sex harassment. Under the new law, taxpayers will not be allowed to take a business deduction:

1. For any settlement or payment related to sexual harassment or sexual abuse claims if the settlement or payment is subject to a nondisclosure/confidentiality agreement;
2. For any attorney fees related to such a settlement or payment subject to a nondisclosure/confidentiality agreement.

The full disclosure requirements will inevitably impact future settlements involving claims of sexual harassment especially for publicly traded companies. Given the now public nature of the settlements the tax law may, ultimately, serve as a deterrent to settling claims on the lone basis of litigation avoidance--even with a non-admissions clause. In this regard, a company may be compelled on a public relations front to exonerate itself through a vigorous defense. This is especially true given the fact that if a settlement does occur a plaintiff's attorney will now be harmed with a compelling marketing tool of a media blitz publicizing the settlement amount, which may result in more harassment litigation against the company.

Alternatively, not all settlements rise to a level of financial significance that justify waiving the non-disclosure provisions. So, it is imperative for all companies to take the necessary and appropriate measures to place themselves in the best defense posture as possible as a means of substantially lowering potential settlement amounts. Doing so will allow a company to maintain the confidentiality of the settlement while lessening the financial burden associated with the loss of the business deduction.

Employer Take Away: The public policy behind the new tax provisions is to incentivize companies to comply with their equal employment opportunity obligations. Thus, the best course of action is prevent the harassment in the first place. As previously blogged, *“Preventing the “Weinstein” in your Organization: Common Pitfalls in Complying With State and Federal Harassment Laws”* there are several key steps a company should take to prevent harassment claims and, consequently, mitigate threats of sex harassment litigation. Such measures include, but are not limited to, maintaining a strong sex harassment policy, routine training, and comprehensive implementation and enforcement of the policy. In the event of a sexual harassment claim is filed, we recommend that prior to settling a claim of harassment that a company contact its employment counsel and accountant to conduct a comprehensive analysis of the impact the Tax Cuts & Jobs Act has on its organization.