



## "Me, Too" Taxed Too? Answer: NO!

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In an article published in the February 20, 2019 *NH Bar News*, I discussed the poorly drafted provision in the "Tax Cuts and Jobs Act of 2017," Section 162(q) to the Internal Revenue Code. That provision takes away the business tax deductions for payments made to settle sexual harassment claims when the settlement agreement contains confidentiality provisions, to wit:

*§ 162(q) to the Internal Revenue Code*

*"(q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.*

*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."* (emphasis added)

The provision was inserted into the tax code as the result of U.S. Senator Menendez' (N.J.) desire to punish corporate employers that required confidentiality/non-disclosure provisions (NDA's) because secret settlements allowed serial rapists and harassers to repeat their crimes without any public shaming — or warnings to future victims.

Media reports surrounding the "Me, Too" stories about rich and famous serial sexual harassers were plentiful and shocking. Because most sexual harassment victims prefer to avoid public trials, their private settlement agreements were easy prey for unwanted NDAs.

A big problem arose, however, because of the wording of Section 162(q). It failed to specify that the non-deductibility of attorney fee payments was meant only for the corporations employing the harassers, and not also the victims of the harassment. (Sexual harassment victims have been able to deduct their attorney fees for settlements and judgments since the American Jobs Creation Act of 2004, along with a wide array of other employment and civil rights claimants.)

Settlement agreements entered into during 2018 were the test cases for how the IRS would interpret the law. *Tax advisors warned: be careful. Assume the law reads as it was written.* As a result, plaintiffs lost out on potential settlements when (usually insured) employers required

NDA's. The difference in paying taxes on 100 percent of a settlement and, in a typical 1/3 attorney fee contract, paying taxes on 66 percent of the settlement was significant.

### **THE IRS TO THE RESCUE? REALLY? YES, REALLY!**

In a quiet press release issued on February 28, 2019 (<https://www.irs.gov/newsroom/section-162q-faq>), the IRS weighed in and the news was good for victims who had signed settlement agreements with NDAs since December 2017. It reads simply:

#### ***Section 162(q) FAQ Question:***

*Does section 162(q) preclude me from deducting my attorney's fees related to the settlement of my sexual harassment claim if the settlement is subject to a nondisclosure agreement?*

#### **Answer:**

*No, recipients of settlements or payments related to sexual harassment or sexual abuse, whose settlement or payment is subject to a nondisclosure agreement, **are not precluded by section 162(q) from deducting attorney's fees** related to the settlement or payment, if otherwise deductible. See Publication 525, Taxable and Nontaxable Income, for additional information on when all or a portion of attorney's fees may be deductible. (Emphasis added)*

The bottom line: the benefits of the 2004 tax provision remain for employee sexual harassment victims. They may sign settlement agreements containing NDA's and still be able to deduct attorney fees they paid to resolve the case.

### **BUT NDAS ARE STILL BURDENSOME FOR VICTIMS**

This IRS FAQ does not change what most plaintiffs' advocates consider to be a more important reason to refuse NDA's in sexual harassment settlement agreements: the burdens such promises of secrecy create for the psychological healing of victims. Women (and the victims are usually women) heal by sharing their stories with each other. I advise clients to not sign NDA-laden agreements because they will break them. They will be at an event, or meeting, or party, or at a bar and another woman will share her "Me, Too" story. For a client who has experienced her own workplace rape or other harassment, being gagged and unable to join in the discussion can be devastating. They feel their "gagging" is keeping them from healing and, keeping them from helping others to heal. Do sexual harassment victims really want to live with a "*payback the settlement funds*" provision looming over their conversations for the rest of their lives? No!

Is it ethical to advise a client to sign an agreement with an NDA because "*no one will ever find out if you talk about it with others.*" No! (and, in this day and age of social media, it is very possible someone *will* find out, especially if they are looking, including for revenge.) It is axiomatic, that while totally undeserved, many sexual harassment victims feel shame and embarrassment. Rendering their stories "secret" only compounds those feelings. The adage, "*The truth shall make you free,*" (whether or not Biblically-based), became an adage for a reason.

More practically, neither employers, nor perpetrators, have much reason to publicize sexual harassment settlements, so while some victims prefer to keep the allegations and settlement terms confidential, the lack of an NDA neither requires, nor urges they publicize. I advise my clients that the intentional publication of a victim's sexual harassment settlement by one other than the victim, herself, can form the bases for claims of retaliation and/or privacy violations; and, experienced counsel for employers similarly advise their clients.

To recap: Thanks to the recent IRS FAQ, there is no longer any threatened tax disadvantage to victims of sexual harassment whose settlement agreements contain NDAs. (Thus, there is no need for Senator Menendez to reintroduce his May 2018 "fix it" bill, the "*Repeal the Trump Tax Hike on Victims of Sexual Harassment Act of 2018.*") But, since December 2017, there remains a tax disadvantage to (uninsured) employers whose sexual harassment settlement agreements contain NDAs. Payments the employers make to the victims, and payments the employers make to their defense counsel, are no longer deductible as business expenses.

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