HARVEY WEINSTEIN, TAX REFORM, AND NONDISCLOSURES - OH MY!

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There is no doubt that the movement known as #MeToo has brought workplace sexual harassment to the forefront of conversation and is both a top priority and concern for all employers. One of the many names associated with this movement is Harvey Weinstein, a famous film producer who was accused of sexual abuse by multiple women in October 2017. As part of this nation-wide movement, Congress took this as a call-to-action in what is being misleadingly dubbed the "Weinstein Tax" as part of the Tax Cuts and Jobs Act. However, this new provision is not a tax at all, but rather a denial of an employer's deduction for certain expenses that traditionally had been considered ordinary and necessary expenses paid or incurred in carrying on any trade or business.

So, the question is – what deduction is prohibited? Internal Revenue Code Section 162(q), which became effective for amounts paid or incurred after December 22, 2017, states:

> (q) Payments related to sexual harassment and sexual abuse. No deduction shall be allowed under this chapter for –
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> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
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> (2) attorney's fees related to such a settlement or payment.

While the provision may seem simple on its face, that is not in fact the case. To the contrary, based on the limited guidance available, the statute conflicts with the Joint Explanatory Statement, is overbroad, and raises a number of questions regarding its applicability.

A plain reading of the statute would appear to indicate that while an employer is not permitted to deduct for any settlement or payment if such settlement or payment is subject to nondisclosure, the attorney's fees are not deductible regardless of whether there is a nondisclosure. This interpretation, however, directly conflicts with the Joint Explanatory Statement of the Committee of Conference, which states, "under the provision, no deduction is allowed for any settlement, payout, or attorney fees related to sexual harassment or sexual abuse if such payments are subject to a nondisclosure agreement."

The statute is also overly broad, as it is unclear whether a lump sum payment under a confidential settlement agreement addressing multiple claims, not all of which are related to sexual harassment or sexual abuse, would also be subject to a denial of deduction. Relatedly, it is unclear whether an allocation of the settlement payment among multiple claims would be respected. Indeed, interpreting the applicability of the statute is even more troublesome due to the lack of guidance as to the scope of terms, including "nondisclosure agreement" and "sexual harassment" and "sexual abuse." It is also worth noting that the statute refers to any payments (not just settlement payments) if they are "related to" sexual harassment or sexual abuse if such payments are subject to a nondisclosure agreement. The statute does not require that the payment be made to the victim of the harassment, just that it relates to harassment and is confidential. Would costs relating to a confidential investigation be covered by the statute? What about implied confidentiality agreements created by privacy laws? Would payments for the employer's defense costs be covered? These are all questions that the courts, IRS, and employers will have to struggle with in connection with the statute.

Roetzel will continue to provide updates as additional guidance is provided by the Internal Revenue Service. For additional information or assistance with the applicability and effect of the new provision, please contact any of the listed Roetzel attorneys.

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