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As Fox Settles Suits Without Confidentiality, Will Nondisclosure Provisions Disappear?

The news that [Fox settled discrimination lawsuits involving 18 former employees for roughly \\$10 Million](#) without confidentiality provisions may seem to reflect a new openness after past Fox scandals. It may well be. But given the tax laws, it could also suggest a trend in favor, not necessarily of *publishing* the details, but of not affirmatively *precluding* disclosure. That may be good business. It also

may be good for the defendants' tax bills. It could be good for plaintiffs too.



The massive tax bill passed at the end of 2017 included a provision that was a direct outgrowth of the #MeToo movement. The tax code now denies tax deductions in

confidential sexual harassment or abuse settlements. Notably, this “no tax deduction” rule applies to the lawyers’ fees, as well as the settlement payments. New Section 162(q) of the tax code provides:

(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."

The provisions does not cover race, gender or age discrimination, but only sexual harassment or abuse. Yet sexual harassment allegations feature as at least part of the claim in many employment disputes. The new law is broad enough that it could apply to all of the money, even though only a relatively minor amount might be for sexual harassment. Traditionally, of course, almost all legal settlement agreements have some type of confidentiality or nondisclosure provision.

It is unclear whether *any* mention of sexual harassment will trigger the Weinstein provision. If it does, it might bar *any* tax deduction, even if the sexual harassment part of the case is minor. Plaintiff and defendant may want to agree on a particular tax allocation, attempting to head off the provision. In a \$1M settlement involving numerous claims, could one allocate \$10,000 to sexual harassment? Legal settlements are routinely divvied up between claims, though being reasonable is important. At the least, there could be additional reasons for the parties to address allocations. The IRS is never bound by allocations in settlement agreements, but the IRS often respects them.

We may start seeing explicit sexual harassment allocations where sexual harassment was the primary impetus of the case, and where the claims are primarily about something else. Perhaps the parties will allocate \$50,000 of a \$1M settlement to sexual harassment. Alternatively, the parties might agree that *no* portion of the settlement is allocable to sexual harassment. But an even safer way to make sure tax deductions are available may be to simply not require confidentiality. This does not mean that there has to be a public disclosure of anything.

The plaintiff and defendant may both have their own reasons for not wanting to trumpet details of the case or the settlement. But by *omitting* confidentiality and nondisclosure provisions, tax deductions for settlement payments and for legal fees are unaffected. Plaintiffs may be better off too. As written, the Weinstein provision could even cut off tax deductions for legal fees paid by the *plaintiff* in a sexual harassment case. This result surely was not intended, but the wording could cover plaintiff's legal fees too. We do not yet know how this will be read by the IRS, or whether a technical corrections bill might address this. But omitting the usual confidentiality or nondisclosure provisions from the settlement agreement will obviate the issue entirely. At the very least, we are seeing [sexual harassment settlements and legal fees in a new era](#).

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.