



# Taxing Clawbacks

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*Tax Notes*

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Rosina B. Barker and Kevin P. O'Brien are partners with Ivins, Phillips & Barker, Washington. This report explores the tax treatment of compensation clawbacks and addresses the tax treatment of clawbacks generally and the tax questions raised by the many special cases likely to arise. These include compensation setoffs, or holdbacks, and their issues under sections 61 and 409A; the tax treatment of repaying employer stock under section 83; the special issues under section 162 or 165 and section 1341 raised by retroactive clawbacks imposed on amounts paid before the clawback policy was in place; "bad boy" clawbacks and clawbacks from former employees; section 409A problems; and FICA tax questions. This report is intended to be both theoretical and practical. Many tax issues raised by repaying compensation are surprisingly complex and indeterminate. Some seemingly simple questions have no clear answers either in guidance or in income receipt theory. While exploring these knottier conceptual issues in detail, this report attempts to resolve them by setting forth reasonable tax positions. The report summarizes these practical conclusions in its introduction and again in its final section.