



IPB Alert: Notice 2019-09 and Section 4960

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We have been closely following the new 21% excise tax under Section 4960 for highly compensated non-profit employees. Although targeted to non-profits, the tax can affect corporations who are "related" to non-profits, including corporations with company foundations, VEBAs or PACs. Attached are the alert we sent out last month and a comment letter we will file with the IRS on behalf of IPB clients. Below are answers to a few common questions we have been receiving.

How are corporations potentially affected by Section 4960?

Most commonly, company executives serve in officer or other leadership roles with a company foundation, VEBA, or PAC. If the executive is considered an employee of the non-profit, she risks being a top-5 paid employee of the non-profit in that year, and her compensation (whether from the non-profit or from the company) risks being subject to the 21% excise tax. The IRS view is that the **company** must pay a 21% tax for every year thereafter on amounts it pays the executive in excess of \$1,000,000, regardless of whether the executive has any ongoing relationship with the non-profit. In other words, employment with a foundation marks the executive for all future years.

Are officers of a company foundation, VEBA, or PAC really its employees?

Under income tax withholding rules, officers are deemed to be employees. In Notice 2019-09 and informal commentary, the Service has taken this same position under Section 4960, even though the statute does not import this rule. We hope that the Service will walk back this initial view. At the very least, officers providing minimal services should be exempt from the definition, consistent with the approach under income tax withholding rules.



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The current IRS position creates uncertainty. Our fear is that because the definition of "covered employee" looks back to prior years, good faith determinations as to covered employee status made for 2018 and 2019 will not be accorded deference by the IRS when it releases its rules.

What should companies do now?

Companies should assess their risk and adapt appropriately. We recommend a few practical first steps:

- Don't add to the problem. If your CFO typically serves as CFO of the foundation, and you just hired a new CFO, think twice before continuing this practice.
- Accurately report the level of officer services on the foundation's Form 990PF. The form requires reporting the weekly hours an officer spends on foundation matters. Often, this is reported as 1-2 hours per week, but our expectation is that this significantly overstates the level of services provided in many cases. Consider reducing the number on the Form 990PF to more accurately reflect the level of services, which can preempt an IRS claim that these individuals are providing significant services and therefore are employees.
- Make good faith determinations for 2018. The tax is reported on Form 4720. Some tax departments like to file these with a \$0 owed, with the view that such a filing starts the statute of limitations for the Service to later challenge the tax.

Companies should also consider whether there may be other ways to establish the non-employee status of potentially affected officers.

What does IPB's comment letter say?

Our letter first explains that the Service interprets Section 4960 too broadly. In our view, even if related organization pay counts for certain purposes, the amount of the tax should be determined solely by amounts paid by the tax-exempt organization. So if a company foundation does not pay its officers or employees, there should be no Section 4960 tax.

The letter makes a number of other practical recommendations for ways the IRS could grant relief to impacted entities, even if it is not inclined to agree with our interpretation of how the Section 4960 tax is supposed to work.