

Nondisclosure Provisions in Settlement Agreements Affected by Tax Cuts and Jobs Act

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The Tax Cuts and Jobs Act (the "Tax Act"), which is expected to be enacted soon, denies to employers and other defendants any deduction for any settlement or payment related to sexual harassment or sexual abuse if the settlement or payment is subject to a non-disclosure agreement. Moreover, the attorneys' fees related to such a settlement or payment are also not allowed as a deduction.

This provision is immediately effective and applies to amounts paid or incurred after the date of enactment of the Tax Act.

It is unclear whether agreements entered into prior to the effective date of the Tax Act, where payments are made after the effective date, are subject to this limitation on deduction. Accordingly, some clarification on that issue is needed.

The breadth of the provision is also unclear. Where many claims are made and one of them is sexual harassment or sexual abuse, can the settlement agreement be subject to non-disclosure except insofar as it relates to the claims and settlement of sexual harassment or sexual abuse?

Where claims are made that there are sexual harassment and sexual abuse, can the claimant eliminate or dismiss those claims and enter into a settlement agreement resolving other claims, which is then subject to non-disclosure?

The parties to a court proceeding might be subject to non-disclosure requirements due to a court order. If so, does the provision apply to eliminate the deduction?

Until clarification is issued, employers should consult with their attorneys when deciding whether to include a non-disclosure provision if any claim of sexual harassment or sexual abuse was made by the claimant.

There may be a circumstance where the claimant wants non-disclosure. Even if the claimant has insisted on non-disclosure, the deductions for the settlement payment and the attorneys' fees seem to be unavailable.

And the claimant may not be able to deduct the attorney's fees incurred by the claimant.

For further information regarding the ramifications of this provision, please contact Gary R. Glenn at (248) 267-3299.