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The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements

*Shane Rader**

ABSTRACT

The Tax Cuts and Jobs Act has been hailed by many as both a significant and sensible tax reform. It lowered the U.S.'s notoriously high corporate tax rates while also providing a tax break for many individual Americans. Although this tax reform has its benefits, this article discusses a troubling provision that has not garnered much attention. This particular provision, incorporated into the Internal Revenue Code as § 162(q), does not allow the deduction of settlement or attorneys' fees in sexual harassment cases when a settlement is subject to a non-disclosure agreement. Although the intention of this reform was to protect victims of sexual harassment, the statutory language actually harms victims in a number of ways. Congress has recognized some of these issues, but unfortunately it does not understand the full scope of the problem. This ultimately leaves victims in harm's way as efforts to correct the legislation have stalled. This article addresses the three significant problems with § 162(q) and proposes potential solutions.

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I. INTRODUCTION

Harvey Weinstein is one of many names to have fallen from grace as the #MeToo movement has revealed an ugly side of American business.¹ Individuals exposed have ranged from once endearing figures like Bill Cosby,² to highly rated TV personalities like Bill O'Reilly.³ Americans have watched in horror as they discovered Harvey Weinstein alone had 87 accusers;⁴ Bill Cosby's trail of victims spanned more than half a century;⁵ and Bill O'Reilly's settlements topped \$45 million.⁶ Many people have wondered how such large groups of victims could remain silent for such a long period of time.⁷ The sad truth is that lawyers advising these unsavory characters required victims to enter into non-disclosure agreements ("NDAs") as a condition to settlement.⁸ These agreements, usually structured as gag orders, enabled these men to force victims to remain quiet or risk paying a large sum in liquidated damages if the harassment was disclosed.⁹

Although a few states tried to correct this injustice by passing legislation prohibiting the use of NDAs in sexual harassment cases,¹⁰ the vast majority have not acted.¹¹ With the growing momentum of the #MeToo movement, Congress attempted to limit the use of NDAs in sexual harassment settlements.¹² One reform in particular, passed by Congress and signed into law by President Trump in December of 2017, was the landmark Tax Cuts and Jobs Act ("TCJA").¹³ With this reform passing on the heels of the Harvey Weinstein scandal, many commentators have referred to it as the "Weinstein tax."¹⁴

1. Frankie Shaw, *263 celebrities, politicians, CEOs, and others who have been accused of sexual misconduct since April 2017*, VOX (Dec. 17, 2018), <https://www.vox.com/a/sexual-harassment-assault-allegations-list>.

2. Kyle Kim et al., *Bill Cosby: A 50-year chronicle of accusations and accomplishments*, SAN DIEGO UNION-TRIBUNE (Sept. 25, 2018, 11:34 AM), <https://www.sandiegouniontribune.com/news/latest-bill-cosby-timeline-htmistory.html>.

3. Michelle Ruiz, *Bill O'Reilly's Sexual Harassment Settlements Are Even Uglier Than We Thought*, VOGUE (Apr. 5, 2018, 11:57 AM), <https://www.vogue.com/article/bill-oreilly-sexual-harassment-settlement-news>.

4. Sara M Moniuszko & Cara Kelly, *Harvey Weinstein scandal: A complete list of the 87 accusers*, USA TODAY (Oct. 27, 2017, 4:51 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/>.

5. Kim, *supra* note 2.

6. Ruiz, *supra* note 3.

7. See Nicole Karlis, *How non-disclosure agreements silence victims*, SALON (Dec. 10, 2017, 4:00 PM), <https://www.salon.com/2017/12/10/how-non-disclosure-agreements-silence-victims/>.

8. See *Nondisclosure Agreements: What Are They, and How Do They Work in Sexual Harassment Cases?*, THE SPIGGLE LAW FIRM (last visited Apr. 6, 2019), <https://www.spigglelaw.com/employment-blog/nondisclosure-agreements-work-sexual-harassment-cases/>.

9. See *id.*

10. Jonathan Ence, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, U. MO. J. OF DISPUTE RESOLUTION 165, 174 (2019).

11. Associated Press, *States move to limit workplace confidentiality agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/>.

12. *Id.*; Ence, *supra* note 10, at 172.

13. Louise Radnofsky, *Trump Signs Sweeping Tax Overhaul Into Law*, THE WALL STREET JOURNAL (Dec. 22, 2017, 11:45 AM), <https://www.wsj.com/articles/trump-signs-sweeping-tax-overhaul-into-law-1513959753>.

14. *The "Weinstein Tax" and the Unintended Consequences of Congress' Response To the #MeToo Movement*, GORDON & REES (Feb. 2018), <https://www.gordonrees.com/publications/2018/the->

A social reform of this nature being incorporated into a tax reform bill may strike some as odd, but this is not the first time that Congress has encouraged social reforms in this way.¹⁵ The reform itself, codified in § 162(q) of the Internal Revenue Code (the “Code”), prohibits the deduction of “any settlement or payment related to sexual harassment,” including attorneys’ fees, when an NDA is used.¹⁶ Although NDAs can still be used, savvy employers will think twice before including them in settlements—especially when there are large payouts. For instance, in Fox News’ \$20 million settlement with Gretchen Carlson for sexual harassment by CEO Roger Ailes, the effect of § 162(q) would have been an increase in the corporation’s taxes by \$4.2 million from the settlement alone.¹⁷

The incorporation of this section into the TCJA was unlikely for multiple reasons. The first surprise was that the amendment, proposed by a Democrat, survived the scrutiny of a Republican-led committee.¹⁸ Although Republicans are generally resistant to workplace and social reforms like these, the amendment was incorporated into the final draft of the bill.¹⁹ What is even more surprising is the legislator who introduced the amendment, Senator Bob Menendez (D–NJ).²⁰ Of all the Democrats to support the #MeToo agenda, Senator Menendez is not particularly well known for supporting women’s rights on a personal level. For example, there appears to be corroborating evidence that he was having sex with underage prostitutes as part of his recent corruption investigation.²¹ This ultimately led to a severe admonishment by the Senate Ethics Committee and an indictment for bribery charges by federal prosecutors.²²

weinstein-tax-and-the-unintended-consequences-of-congress-response-to-the-metoo-movement; Robert W. Wood, *Ironically, Weinstein Tax On Sexual Harassment Settlements May Hurt Plaintiffs Too*, FORBES (Jan. 3, 2018, 8:51 AM), <https://www.forbes.com/sites/robertwood/2018/01/03/ironically-weinstein-tax-on-sexual-harassment-settlements-may-hurt-plaintiffs-too/#27296a8f463d> [hereinafter Wood, *Weinstein Tax May Hurt Plaintiffs*].

15. See, e.g., 26 U.S.C. § 132 (2018).

16. 26 U.S.C. § 162(q) (2017).

17. Assuming a flat corporate tax rate of 21%, multiplied by the settlement amount of \$20 million, equals \$4.2 million. Although taxes are not directly increased this much, it will have the same effect by denying the \$20 million as a deductible business expense; Bill Chappell, *Fox Will Pay Gretchen Carlson \$20 Million To Settle Sexual Harassment Suit*, NPR (Sept. 6, 2016, 9:42 AM), <https://www.npr.org/sections/thetwo-way/2016/09/06/492797695/fox-news-will-pay-gretchen-carlson-20-million-to-settle-sexual-harassment-suit>.

18. CONG. RES. SERV., SENATE COMMITTEE PARTY RATIOS: 98TH-116TH CONGRESSES 5 (2019), <https://fas.org/sgp/crs/misc/RL34752.pdf>.

19. *Republican Party*, HISTORY (Oct. 11, 2019), <https://www.history.com/topics/us-politics/republican-party>.

20. *Legal Alert: Section 162(q) Raises Questions about Deductibility of Employment Settlements*, EVERSHEDES SUTHERLAND (Dec. 27, 2017), <https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/207305/Legal-AlertSection-162q-Raises-Questions-about-Deductibility-of-Employment-Settlements>.

21. Steven Nelson, *Feds Say ‘Corroborating Evidence’ Backed Menendez Prostitution Claims*, U.S. NEWS & WORLD REPORT (Aug. 24, 2015), <https://www.usnews.com/news/articles/2015/08/24/feds-say-corroborating-evidence-backed-menendez-prostitution-claims>.

22. Matt Apuzzo, *Senator Robert Menendez Indicted on Corruption Charges*, N.Y. TIMES (Apr. 1, 2015), <https://www.nytimes.com/2015/04/02/nyregion/senator-robert-menendez-indicted-on-corruption-charges.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>; Devlin Barrett et al., *Justice Department says it will retry Sen. Robert Menendez following mistrial on bribery charges*, WASHINGTON POST (Jan. 19, 2018), https://www.washingtonpost.com/world/national-security/justice-department-says-it-will-re-try-sen-robert-menendez-following-mistrial-on-bribery-charges/2018/01/19/240fce5c-fd51-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.bfb9614616d7; Herb Jackson, *Ethics committee*

Regardless of the law's origin, its tax implications are certain to impact how sexual harassment settlements are structured. Although tax reforms do not require changed behavior, ignoring the behaviors can hit people where it hurts most—their wallets. While the initial reaction to the law was quite positive, a growing number of people doubt its effectiveness.²³ Some experts have pointed out the potential for negative tax and privacy consequences to victims, as well as unnecessary gray areas of the law that might lead to litigation.²⁴ Both of these are concerns that Congress does not seem to have contemplated when the law was passed.²⁵

Part II of this article provides a brief history of NDAs and illustrates how they have been used to constrain victims of sexual harassment. Part III discusses the text of § 162(q) and highlights the three major concerns with the law's text. Part IV brings to light an additional concern with § 162(q) as it interacts with new TCJA reforms. Part V identifies instances where this reform has started to change corporate behavior and speculates about the law's overall effectiveness. Part VI highlights the solutions that would make this a truly effective tax reform. Part V concludes.

II. NON-DISCLOSURE AGREEMENTS – THEN AND NOW

NDAs started becoming prevalent in businesses as early as the 1940s.²⁶ Attorneys used them to help safeguard companies' valuable trade secrets from competitors.²⁷ Although companies could not control employee turnover, NDAs helped ensure the confidentiality of company information by making employees personally liable if they violated the agreement.²⁸ The use of NDAs in these situations generally made sense and were not controversial.²⁹ However, beginning in the 1980s, NDAs began to creep into an ever-increasing number of contracts, including standard settlement agreements.³⁰ Although there was no federal response addressing secrecy in settlements,³¹ some states began passing sunshine-in-litigation statutes prohibiting NDAs in certain instances.³² For example, Florida's

admonishes Sen. Bob Menendez over taking gifts, advocating for donor, USA TODAY (Apr. 26, 2018, 4:54 PM), <https://www.northjersey.com/story/news/new-jersey/2018/04/26/ethics-committee-admonishes-sen-bob-menendez-over-taking-gifts-advocating-donors/555685002/>.

23. See Trey Cooper, *Tax Cuts and Jobs Act Limits Business Expense Deduction for Settlement of Sexual Harassment Claims*, ARK. LAW. 32, 33 (2018); Robert W. Wood, *Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein*, N.Y. ST. B.J. 10, 13 (Feb. 2010), http://www.woodllp.com/Publications/Articles/pdf/Tax_Write-Offs_NYSBA.pdf [hereinafter Wood, *Tax Write-Offs After Weinstein*].

24. Cooper, *supra* note 23, at 33; Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 13–14.

25. Cooper, *supra* note 23, at 32–33; Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 12–13.

26. Michelle Dean, *Contracts of Silence*, CJR (2018), https://www.cjr.org/special_report/nda-agreement.php/.

27. *Id.*

28. *See id.*

29. *See id.*

30. *Id.*

31. Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 442 (2005).

32. *See e.g.*, FLA. STAT. § 69.081 (1999); Ronald L. Burdge, *Confidentiality in Settlement Agreements is Bad for Clients, Bad for Lawyers, Bad for Justice*, A.B.A. (Nov. 1, 2012),

law prohibits NDAs that conceal a public hazard or information which could help the public protect themselves.³³ Although it would appear that Harvey Weinstein and other repeat offenders would fall under the definition of a “public hazard,” courts have yet to apply statutes like this to NDAs in sexual harassment cases.³⁴

For attorneys, there is no secret sauce to create an NDA, as these agreements are governed by contract law.³⁵ This allows each NDA to be tailored to the facts of the case at hand. Each NDA varies in how much information the parties restrict, what (if any) disclosure is permitted, and the amount of liquidated damages if a breach occurs.³⁶ Although NDAs are usually structured as bilateral (meaning they bind both parties), they can also be set up as unilateral, where only one party is restricted from disclosure.³⁷

In recent years, attorneys have crafted NDAs that are increasingly restrictive for the victims of sexual harassment. Highly unusual requirements exposed in the NDA between Mr. Weinstein and his former assistant, Zelda Perkins, required that her doctor and family members sign separate NDAs before she could discuss any of the harassment with them.³⁸ Additionally, the agreement limited the scope of her testimony if there was a criminal trial, and even barred her from possessing a copy of the agreement itself.³⁹ Details from the NDAs entered into by Bill O’Reilly and his victims were just as shocking, requiring them to forfeit their diaries, photos, and e-mails relating to the harassment.⁴⁰ It even forced victims to lie if asked about the incident by “disclaim[ing] ‘as counterfeit or forgeries’” any materials made public.⁴¹

III. THE NEW LEGISLATION

A. *The Purpose of I.R.C. § 162(q)*

These recent examples highlight how NDAs have morphed from instruments that protect business trade secrets into gag orders that benefit the powerful and corrupt. Congress heard the public outcry against this perversion of NDAs and

https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/.

33. See, e.g., Ray Shaw, *Sunshine in Litigation*, THE FLORIDA BAR (last visited Apr. 6, 2019), <https://www.floridabar.org/the-florida-bar-journal/sunshine-in-litigation/>.

34. Alexander Dudley, *It’ll Be Our Little Secret: A Look into the Legality & Enforceability of Non-disclosure Agreements in Sexual Assault and Harassment Cases*, U. OF MIAMI L. REV. (June 30, 2018), <https://lawreview.law.miami.edu/itll-secret-legality-enforceability-nondisclosure-agreements-sexual-assault-harassment-cases/>.

35. Joe R. Thompson, *Overview of Confidentiality Agreements*, IOWA STATE UNIV. (updated Sept. 2013), <https://www.extension.iastate.edu/agdm/wholefarm/html/c5-80.html>.

36. *Id.*

37. Catherine Bragg, *Non-Disclosure Agreements in Review*, A.B.A. (Aug. 20, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/summer2019/non_disclosure_agreement/.

38. Stacy Perman, *#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases*, LOS ANGELES TIMES (Dec. 31, 2018, 3:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html>.

39. *Id.*

40. Andrew Kirell, *Bill O’Reilly Harassment Settlement Deal Required His Accusers to Lie*, DAILY BEAST (Apr. 4, 2018, 3:48 PM), <https://www.thedailybeast.com/bill-oreilly-harassment-settlement-deal-required-his-accusers-to-lie>.

41. *Id.*

decided to enact legislation to discourage it.⁴² The law itself, § 162(q), states that “[n]o 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) attorneys’ fees related to such a settlement or payment.”⁴³

In theory, this legislation will increase taxes on businesses by denying what is normally deductible as an ordinary and necessary trade or business expense.⁴⁴ Taxable income is defined as gross income minus deductions.⁴⁵ By denying a deduction for expenses relating to sexual harassment as a trade or business expense, a company will have a higher taxable income, leading to more taxes.⁴⁶ On its face this appears to be a good deterrent to limit the use of NDAs in sexual harassment cases. Although this legislation does not influence all settlements, it will surely impact savvy businesses who make tax-conscious decisions. Some critics, however, find this reform wholly insufficient.⁴⁷ Instead, they believe NDAs should be banned in all sexual harassment settlements.⁴⁸ Although some states may choose to provide more restrictive regulations on sexual harassment NDAs, the current tax reform is the first national reform of its kind.⁴⁹ The reform may not completely prohibit NDAs in sexual harassment cases, but it at least “raises the price of secrecy” and will hopefully change the current trend to favor victims.⁵⁰

B. Unintended Consequences

At first blush, the legislation appears to be a simple solution to a simple problem—all NDAs are bad, and their use should be discouraged. Although disincentivizing the use of NDAs as gag orders is a step in the right direction, this legislation fails miserably in other areas because of its unintended consequences. First, the law appears to deny the deduction of attorneys’ fees to both plaintiffs and defendants if there is an NDA.⁵¹ To victims, this would be a negative tax consequence that did not exist before the law.⁵² Second, the legislation fails to consider that NDAs could be used to protect victims’ privacy; instead, it makes the assumption that all NDAs are harmful to victims.⁵³ Third, language in the statute identifying what payments this applies to, as well as other key terms, were never defined.⁵⁴ This leads to needless uncertainty for taxpayers, who may have to bear the cost of litigation. Although Congress has started taking some steps to correct this statute, it seems to be aware of only a fraction of the issues that this legisla-

42. See 26 U.S.C. § 162(q) (2017).

43. *Id.*

44. *Id.*

45. 26 U.S.C. § 63(a) (2018).

46. *See id.*

47. See Michelle Kaminsky, *The Harvey Weinstein Effect: The End of Nondisclosure Agreements In Sexual Assault Cases?*, FORBES (Oct. 26, 2017, 1:00 PM), <https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/#4f78ee4d2c11>.

48. *Id.*

49. Ence, *supra* note 10, at 166; Associated Press, *supra* note 11.

50. Margaret Ryznar, *#METOO & TAX*, 75 Wash. & Lee L. Rev. Online 53, 56–57 (2018).

51. See I.R.C. § 162(q) (2017).

52. Ryznar, *supra* note 50, at 59.

53. See I.R.C. § 162(q) (2017).

54. *Id.*

tion poses.⁵⁵ If an amendment to the TCJA is going to be made, the amendment should consider all of these issues, not only the glaring problems. Each of these unintended consequences is discussed in more detail below.

i. Deductibility of Attorneys' Fees

Section 162(q)(2) states that “[n]o deduction shall be allowed under this chapter for . . . attorney’s fees related to such a settlement.”⁵⁶ The implication is that it prohibits both parties in a settlement from deducting attorneys’ fees if an NDA is used. Normally, victims would take an above-the-line deduction for attorney fees paid in sexual harassment cases;⁵⁷ however, this is a gray area of law that will be discussed at length below.⁵⁸ So, if victims use the above-the-line deduction, they would have to pay taxes on only the proceeds that they actually receive from the settlement.⁵⁹ Although the legislators intended for this law to prohibit the harasser or employer from deducting its attorney fees,⁶⁰ the plain language of the statute appears to deny the deduction to victims as well.⁶¹

If an NDA was included, the result of this legislative error could result in a particularly punishing tax bill for victims. For example, take the settlement discussed earlier between Fox News and Gretchen Carlson for \$20 million.⁶² Assuming the damages she recovered were not derived from a physical injury,⁶³ the entire settlement amount would be taxable.⁶⁴ Applying Carlson’s individual tax rates generates a federal income tax bill of \$7.9 million.⁶⁵ Then assume that one-third of the settlement amount, \$6.7 million, pays for attorneys’ fees. This leaves her with a comparatively small take-home amount of \$5.5 million out of a \$20 million settlement. However, if the attorneys’ fees were taken as an above-the-line deduction, the tax bill would be lowered from \$7.8 million to \$5.2 million, allowing the victim to pocket an extra \$2.6 million. As practitioners have already noticed, the sad truth is that victims subject to an NDA are actually “in a worse position financially than they were before passage of the [TCJA].”⁶⁶

55. See, e.g., Letter from the U.S. Senate Comm. on Fin. to Steven Mnuchin, Sec’y, U.S. Dep’t Treasury & David Kautter, Acting Comm’r, Internal Revenue Serv. (Aug. 16, 2018), (on file with author) [hereinafter Letter].

56. I.R.C. § 162(q) (2017).

57. Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 13.

58. See *infra* Part IV.

59. Cooper, *supra* note 23, at 33.

60. Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 13.

61. See I.R.C. § 162(q) (2017).

62. Chappell, *supra* note 17.

63. Although Carlson has identified Roger Ailes as her harasser, she has not spoken about details of the harassment because of the NDA. Michelle Chen, *How Forced Arbitration and Non-Disclosure Agreements Can Perpetuate Hostile Work Environments*, THE NATION (Nov. 30, 2017), <https://www.thenation.com/article/how-forced-arbitration-and-non-disclosure-agreements-can-perpetuate-hostile-work-environments/>. Because these details are lacking it is unknown if part of her injuries are arguably physical. See *id.* Sexual harassment is not presumed to be a physical injury unless it meets certain criteria. I.R.C. § 104(a)(2) (2018).

64. I.R.C. § 104(a)(2) (2018).

65. See I.R.C. § 1 (2017).

66. Cooper, *supra* note 23, at 33.; See Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 13.

Lawmakers were fairly quick to realize this gaping error in the new law.⁶⁷ Senator Menendez, who proposed the amendment, issued a public statement the day after the TCJA passed Congress.⁶⁸ He described the potential consequences discussed above as “outrageous and maddening,” quickly pointing blame at Republicans on the Senate Finance Committee for the final wording.⁶⁹ In the following months, Republicans on the Senate Finance Committee penned an open letter to the Department of Treasury and Internal Revenue Service (“IRS”) acknowledging the mistake.⁷⁰ The purpose of the letter was an attempt to clarify that Congress’ “legislative intent” was not to prohibit the deduction of victims’ attorneys’ fees.⁷¹ Despite Congressional efforts to correct this problem, the IRS may still be forced to prohibit the deduction by victims, as they “cannot interpret [text] in a manner contrary to [the] plain language of the statute.”⁷² As for now, the IRS has yet to issue any guidance for taxpayers on their official interpretation of the law.⁷³

ii. No Consideration of Unilateral NDAs that Protect Victims

The second mistake—which lawmakers have yet to acknowledge—is that the reform does not consider that victims could benefit from NDAs to protect their privacy.⁷⁴ Although some victims may be comfortable with their harassment becoming public knowledge, others prefer privacy. An attorney who has represented victims in these types of settlement negotiations explained that clients often have a “fear of being retaliated against or ostracized by their employers, potential future employers and even entire industries.”⁷⁵ Some victims even worry about it bleeding over into their personal lives, “[affecting] how their friends and family might treat them ... or [that they] might ... suffer from unwanted attention.”⁷⁶ Although this legislation helps prevent NDAs from being forced on victims, Congress did not anticipate that it would force victims to choose between the value of privacy and a smaller tax bill.

If a victim wants to include an NDA as part of a settlement agreement, the same tax consequences will occur as if the employer forced the NDA on the victim.⁷⁷ The first consequence, that neither party will be able to

67. Press Release, Senator Bob Menendez, Menendez Calls on GOP to Fix its Tax Bill to Protect Victims of Workplace Sexual Misconduct (Dec. 21, 2017) (on file with author) [hereinafter Menendez Statement].

68. *Id.*

69. *Id.*

70. Letter, *supra* note 55.

71. *Id.*

72. *Lawmakers explain TCJA errors & request that IRS guidance reflect Congressional intent pending correction*, THOMSON REUTERS TAX & ACCT., Aug. 20, 2018, 2018 WL 3969468 (RIA).

73. Although the IRS has acknowledged this reform, it has not issued guidance on its website. See *Certain payments related to sexual harassment and sexual abuse*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/settlement-of-attorneys-fees-related-to-sexual-harassment> (last updated Mar. 22, 2019).

74. See Menendez Statement, *supra* note 67.

75. Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017), <http://time.com/5039246/sexual-harassment-nda/>.

76. *Id.*

77. See I.R.C. § 162(q) (2017).

deduct attorney fees related to the settlement, has already been discussed.⁷⁸ This is a direct negative tax consequence for both parties and will discourage victims from seeking NDAs, even for their own privacy. The second consequence is that the employer will not be able to deduct “any settlement or payment related to sexual harassment” as a business expense.⁷⁹ The word “any” is all encompassing, and will likely be interpreted as such, regardless of who the NDA benefits.⁸⁰ Although this is only a direct negative tax consequence to the employer, it will significantly impact victims if they are the only party seeking an NDA.

Anytime an employer is considering settling a sexual harassment case, it will likely complete some type of a cost-benefit analysis to help determine whether to include an NDA in the settlement.⁸¹ This would consist of weighing each option and determining which is less costly.⁸² If the projected taxes are greater than the projected consequences of public disclosure of the sexual harassment, then the company would opt not to include an NDA.⁸³ The problem is that victims who desire an NDA for privacy are now forced to try and bargain with an employer who does not want to include an NDA, because it is contrary to the employer’s best interest. In these situations, a victim’s bargaining power is decreased because they will likely have to compromise on a reduced settlement amount to offset the employer’s increased tax burden.⁸⁴ This tax reform is particularly troubling if one considers a situation where a harasser/employer threatens to humiliate the victim by leaking embarrassing facts. Although disclosure of sexual harassment claims can be a good thing for the public, this law does not fully consider what is in the best interest of victims.⁸⁵

Although statutory language would likely have to be amended to remedy this problem, there is at least one simple solution. As mentioned above, NDAs can be either bilateral or unilateral.⁸⁶ Congress should have allowed for unilateral NDAs that protect victims from unwanted disclosure. Then, the adverse tax consequences would be triggered by either bilateral or unilateral NDAs that protect the employer. At a minimum this would stop the victim’s bargaining power from being further diminished if they insisted on an NDA for their own privacy.

As the law currently stands, the adverse tax consequences to the employer if there is an NDA is calculated as the settlement amount plus attorney fees multiplied by the employer’s marginal tax rate.⁸⁷ Building from the earlier example of the settlement between Fox News and Gretchen Carlson, Fox would multiply the \$20 million settlement by a flat corporate tax rate of 21%.⁸⁸ In this case, the effect of including an NDA for the benefit of the employer would be approximately \$4.2

78. *Id.*; see *supra* Part III(B)(i).

79. I.R.C. § 162(q).

80. See Wood, *Weinstein Tax May Hurt Plaintiffs*, *supra* note 14.

81. *Cost-benefit analysis*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cost%E2%80%93benefit_analysis (last updated Mar. 21, 2019).

82. *Id.*

83. See *id.*

84. *Bargaining power*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bargaining_power (last updated Feb. 8, 2018).

85. See Wood, *Weinstein Tax May Hurt Plaintiffs*, *supra* note 14; see I.R.C. § 162(q) (2017).

86. *Non-disclosure agreement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Non-disclosure_agreement (last updated Mar. 31, 2019).

87. See I.R.C. § 162(q).

88. I.R.C. § 11(b) (2017).

million. Assuming that Fox News is aware of these tax consequences, it would likely require that the settlement be reduced by this amount if Carlson demands a unilateral NDA to protect herself. Also assuming that one-third of the settlement will go towards paying attorneys' fees, which she is now unable to deduct, Carlson would take home approximately \$4.2 million from a settlement valued by the employer at \$20 million.⁸⁹ Clearly, the winner in this scenario is the IRS, who would pocket a whopping \$9.6 million from the transaction (\$3.3 million from the increased corporate tax, and \$6.3 million from the victim).

Bargaining to offset such a large tax increase for the employer puts victims in an unfavorable position to bargain. To make matters worse, employers generally have stronger bargaining power in settlement negotiations, as their deep pockets allow them to outlast an employee during the litigation process.⁹⁰ If an employer has already done a cost-benefit analysis and knows what is in its best interest, it is easy to see how a victim demanding that an NDA be included could be met with strong opposition. As the above example illustrates, the only real bargaining chip a victim has is the ability to take a reduction in the settlement amount. Although this is another disappointing aspect of the law that legislators must not have contemplated, it should not be a huge surprise. After all, this tax reform was introduced only months after the Weinstein scandal broke and was a direct response to a particular problem—victims being silenced.⁹¹ Rather than holding hearings to see the full implications of disincentivizing NDAs, the amendment was quickly incorporated into the TCJA, which passed Congress only a few months after the Senate Finance Committee's last hearing.⁹²

iii. Vague Terms that Complicate Settlements

The last major concern with this new tax provision is that Congress failed to define some of the key terms within the legislation.⁹³ The first issue, noticeable from the plain text of the statute, is that a deduction is prohibited for “any settlement or payment related to sexual harassment.”⁹⁴ The key part that some tax attorneys have questioned is the expansive language of “or payment related to.”⁹⁵ They claim that this language could be interpreted to include payments such as severance pay to both the victim and harasser, as well as settlements for non-

89. This was calculated as 15.8 million less attorney's fees, accounting for one-third of the settlement is \$5.3 million, less tax on the entire settlement amount (assuming it is a non-physical injury) is \$6.3 million and equals a take home amount of \$4.2 million. See I.R.C. § 162(q).

90. Janice Harper, *What to Expect If You Sue Your Employer*, HUFFINGTON POST (Jan. 10, 2012, 2:03 PM), https://www.huffingtonpost.com/janice-harper/what-to-expect-when-you-s_b_1194955.html.

91. GORDON & REES, *supra* note 14; Wood, *Weinstein Tax May Hurt Plaintiffs*, *supra* note 14.

92. Howard Gleckman, *Why The 2017 Tax Cuts Are An Election-Year Bust*, FORBES (Aug. 29, 2018, 9:33 AM), <https://www.forbes.com/sites/howardgleckman/2018/08/29/why-the-2017-tax-cuts-are-an-election-year-bust/#53dcbfee2eb3>.

93. See I.R.C. § 162(q) (2017).

94. *Id.*

95. *Id.*; see also Julia M. Jordan & Christina Andersen, *New Tax Law Limits Deductibility of Harassment Settlements: Where Will the Law of Unintended Consequences Take Us*, N.Y. L. J. (Feb. 18, 2018), https://www.sullcrom.com/files/upload/Jordan_Andersen_New_York_Law_Journal_February2018.pdf; Cooper, *supra* note 23, at 33.

sexual harassment claims that might be tied to the incident.⁹⁶ It would make sense if this language was included to give the IRS discretion in reclassifying settlements to comply with the substance-over-form doctrine.⁹⁷ However, this is purely speculation, because Congress did not define the term or provide any meaningful guidance as to its legislative intent.⁹⁸ This makes it difficult for attorneys trying to advise clients in situations involving sexual harassment. While attorneys always want to advocate for the most beneficial tax position a client can take, they also want to minimize the risk of an expense being reclassified as non-deductible. If a reclassification were to take place, not only would the client have to pay the corrected amount, but also a potential penalty of 20% plus interest.⁹⁹ This is another factor that discourages the use of NDAs by employers, and also further compounds the issue of reduced employee bargaining power when the victim desires an NDA.

The possible impact of this complication is again best illustrated by building on the example of the settlement between Gretchen Carlson and Fox News. Carlson's harassment suit ultimately led to the resignation of former CEO of Fox News Roger Ailes.¹⁰⁰ Ailes received \$40 million in severance pay from Fox News.¹⁰¹ Although the amount appears staggeringly large, this is not uncommon for CEOs of corporations this size.¹⁰² Assuming that the IRS classifies Ailes' severance pay as a "payment related" to the sexual harassment, and that Carlson insists on an NDA for personal privacy, then Fox News is unable to deduct either the severance pay for Ailes or Carlson's settlement and related attorneys' fees.

If Fox requires Carlson to foot the tax bill, she would have to take a reduction in her settlement amount by \$12.6 million (\$8.4 million for the taxes on Ailes severance and \$4.2 million for the taxes on her own settlement).¹⁰³ After subtracting out one-third of Carlson's \$7.4 million settlement for attorneys' fees and Carlson's personal tax, she is left with an even smaller take-home amount of \$2 million, despite her case being valued by Fox at \$20 million.¹⁰⁴ The IRS would see a staggering \$12.8 million increase in revenue from such an application of the law,

96. Cooper, *supra* note 23, at 33.

97. *Substance over form*, WIKIPEDIA, https://en.wikipedia.org/wiki/Substance_over_form (last updated Dec. 17, 2018).

98. Wood, *Tax Write-Offs After Weinstein*, *supra* note 23, at 15.

99. Manny Davis, *6 Common IRS Tax Penalties on Small Business Owners*, ALL BUSINESS, <https://www.allbusiness.com/6-common-irs-tax-penalties-on-small-business-owners-14416466-1.html> (last visited Apr. 9, 2019).

100. Roger Yu, *Roger Ailes steps down as Fox News CEO*, USA TODAY (July 21, 2016, 4:19 PM), <https://www.usatoday.com/story/money/2016/07/21/ailes-steps-down-fox-news-ceo-after-sexual-harassment-lawsuit/87402864/>.

101. *Id.*

102. See Nathaniel Parish Flannery, *Executive Compensation: The True Cost of the 10 Largest CEO Severance Packages of the Past Decade*, FORBES (Jan. 19, 2012, 5:35 PM), <https://www.forbes.com/sites/nathanielparishflannery/2012/01/19/billion-dollar-blowout-top-10-largest-ceo-severance-packages-of-the-past-decade/#22eae9597806>.

103. The tax on Ailes settlement is calculated as \$40 million multiplied by the flat corporate tax rate of 21% which is \$8.4 million. See I.R.C. § 11 (2017); Carlson's settlement is calculated as \$20 million multiplied by the flat corporate tax rate of 21% which is \$4.2 million. See I.R.C. § 11 (2017).

104. Carlson's attorney's fees are assumed as one-third of the \$7.4 million settlement, \$2.5 million, and Carlson's tax is \$2.9 million, calculated as \$7.4 million multiplied by the individual tax rate. See I.R.C. § 1 (2017).

collecting \$2.9 million from Carlson, \$1.5 million from Fox News for Carlson's settlement, and \$8.4 million from Fox News for Ailes' severance.¹⁰⁵

Although this last example illustrates a worst-case scenario, it demonstrates how this tax law can easily be applied in ways that significantly disadvantage victims of sexual harassment. It is entirely possible that Carlson could decide it is not worth including an NDA for economic reasons; however, the difficulty of that personal decision should not be minimized for victims.¹⁰⁶ As discussed above, employers generally have the upper hand in bargaining,¹⁰⁷ so if victims are set on including an NDA for personal reasons, they will likely have to settle for less. In scenarios like this, the real winner of this TCJA reform is, again, the IRS.

Another surprising ambiguity is that § 162 of the Code does not define sexual harassment, sexual abuse, or even nondisclosure agreements.¹⁰⁸ At first glance this might not seem concerning, but too often the outcome of a case hinges on the definition of one of these disputed terms. A court could certainly turn to state statutes, regulations, and agency definitions of sexual harassment if it were looking for guidance.¹⁰⁹ However, because sexual harassment is generally governed by state law, using various state definitions could cause problems when interpreting a federal tax law like the TCJA.¹¹⁰ The Equal Employment Opportunity Commission ("EEOC") is the only federal agency that has passed regulations attempting to define sexual harassment.¹¹¹ In order to file a sexual harassment claim in federal court, the EEOC requires that an individual first file a claim with its office.¹¹² They review the claim to determine whether the incident meets their definition of sexual harassment; only then are you given permission to sue in federal court.¹¹³

Assuming that courts would look to the EEOC's regulations to help define sexual harassment, there are still other issues that would have to be decided. For example, assume an employer settles a claim for sexual harassment with a victim, but a complaint is never filed with the EEOC. Does this claim meet the definition of sexual harassment, even though traditionally the agency makes the determination? Conversely, should the court simply interpret the EEOC's regulations defining sexual harassment without any help from the agency? What if an employee files a claim in state court for sexual harassment, but the same claim would likely have failed under the stringent requirements of the EEOC regulations? These are all issues that may be litigated, but could have been avoided if this amendment went through a more thorough legislative review.

105. Fox News' effective tax increase for Carlson's settlement is \$7.4 million multiplied by the corporate tax rate of 21%, \$1.5 million. Fox News' effective tax increase for Ailes' severance is \$40 million multiplied by the corporate tax rate of 21%, \$12.6 million. *See* I.R.C. § 11(b).

106. Martin, *supra* note 75.

107. Harper, *supra* note 90.

108. I.R.C. § 162(q) (2017); Ence, *supra* note 10, at 8; Paige Hoster Good, *Confidential Sexual Harassment Settlement Payment No Longer Tax-Deductible*, MCAFEE & TAFT (Mar. 28, 2018), <https://www.jdsupra.com/legalnews/confidential-sexual-harassment-17354/>.

109. *See Sex Discrimination & Harassment*, MO. DEPT. OF LABOR, <https://labor.mo.gov/mohumanrights/Discrimination/sex#harassment> (last visited Apr. 9, 2019).

110. "[M]any states have enacted Fair Employment Practice laws which address and regulate sexual harassment on the state level." *Sexual Harassment Law*, HG.ORG, <https://www.hg.org/sexual-harassment-law.html> (last visited Apr. 9, 2019).

111. *See* 29 C.F.R. § 1604.11 (1999).

112. *Filing a Lawsuit*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Apr. 9, 2019).

113. *Id.*

The term “nondisclosure agreement” is also not defined in § 162.¹¹⁴ Although the law was meant to apply to NDAs in the settlement agreement itself, it is unclear if this would apply to NDAs previously entered into between the victim and employer. For example, assume that an employee signed a broad NDA at the time that they were hired, stating that they would “never disclose harmful or damaging information concerning the employer.” Could such an NDA be construed to apply to a settlement in a sexual harassment case? Victims might be too afraid to find out, opting to stay silent rather than risk litigation. With a little more forethought, Congress could have drafted language that would have clearly included these prior NDAs. For example, they could have defined an NDA to include “any agreement that would hinder a victims’ disclosure of their sexual harassment claims.” Unfortunately for now, this will remain a gray area of law until litigation answers some of these questions.

IV. SECTION 162(Q) IN LIGHT OF OTHER TCJA REFORMS

The TCJA encompassed far more than just the social reform included in § 162(q) of the Code.¹¹⁵ In fact, the bill has been described by some as the largest tax reform in 30 years, including dozens of major changes affecting how both individuals and businesses are taxed.¹¹⁶ Although Congress explained their reasoning behind each change, they may not have considered exactly how some of these changes interact with one another. As alluded to above, there are some gray areas concerning a victim’s ability to deduct attorney fees as an above-the-line deduction.¹¹⁷ This would have been less worrisome before the passage of the TCJA, as the miscellaneous itemized deduction provided a way for individual taxpayers to deduct their attorneys’ fees.¹¹⁸ Although they may return after 2025, the TCJA temporarily eliminated miscellaneous itemized deductions.¹¹⁹

A miscellaneous itemized deduction would have allowed for “individual taxpayer[s] who took itemized deductions ... [to] deduct legal fees ... greater than 2% of ... adjusted gross income as a miscellaneous expense.”¹²⁰ The deduction was available to taxpayers regardless of the type of litigation. This option is currently unavailable to taxpayers, as they are limited to deducting claims that qualify as above-the-line deductions.¹²¹ Unlike the miscellaneous itemized deduction, what qualifies as above-the-line for attorney fees is quite limited.¹²² There are only

114. See I.R.C. § 162(q) (2017).

115. *The Tax Cuts and Jobs Act (TCJA): Which Provisions are Temporary and Which are Permanent*, DYNAMIC WEALTH ADVISORS (Sept. 26, 2018), <https://www.dynamicwealthadvisors.com/the-tax-cuts-and-jobs-act-tcja-which-provisions-are-temporary-and-which-are-permanent/>.

116. *Id.*; *Biggest Tax Changes in 30 Years Passed by Congress*, FRAZIER & DEETER, <https://www.frazierdeeter.com/articles/biggest-tax-changes-in-30-years-passed-by-congress/> (last visited Apr. 9, 2019).

117. See I.R.C. § 162(q).

118. I.R.C. § 67(b)(6) (2017); Stephen Fishman, *Are Attorney’s Fees Tax Deductible?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/taxation/tax-audits/are-attorneys-fees-tax-deductible.html> (last visited Nov. 5, 2019).

119. I.R.C. § 67.2(g) (2017).

120. Jia Liu, *No Deduction for Attorney’s Fees under the Tax Cuts and Jobs Act*, ROYSE L. FIRM (Mar. 20, 2018), <https://rroyselaw.com/tax-law/article/no-deduction-for-attorneys-fees-under-the-tax-cuts-and-jobs-act/>.

121. *Id.*

122. I.R.C. § 62 (2018).

two provisions discussing the deductibility of attorney fees as above-the-line deductions.¹²³ They are limited to discrimination suits and suits involving whistleblowers.¹²⁴ Because the latter is inapplicable, sexual harassment claims must fit within the umbrella of unlawful discrimination to be deductible above-the-line.¹²⁵

Although sexual harassment and discrimination are conceptually distinct offenses, both federal agencies and courts have been willing to define unlawful discrimination rather broadly. Section 62 of the Code defines unlawful discrimination as any discrimination defined within over a dozen federal acts, ranging from discrimination in housing to discrimination against individuals with disabilities.¹²⁶ One of these acts, the Civil Rights Act of 1964, prohibits employers from discriminating based on an individual's "race, color, religion, sex, or national origin."¹²⁷ In *Meritor Savings Bank v. Vinson*, the Supreme Court upheld the EEOC's broad interpretation of sexual harassment as being a "form of sex discrimination prohibited [by the Civil Rights Act of 1964]."¹²⁸

Although it appears that sexual harassment falls under the umbrella of discrimination as defined in § 62, this is not a settled area of law. An argument could still be made that the statutory intent of the drafters was to limit this deduction to the traditional concept of discrimination, instead of an apparently broad definition provided by regulations issued decades after the Act by the EEOC. This argument is bolstered by the fact that § 62(e) shows a narrower legislative intent by defining discrimination as:

"[a]ny provision of Federal, State, or local law ... regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law."¹²⁹

Both the examples listed and the statutory language seem to infer that the legislators were trying to define discrimination as some type of retaliatory act inflicted on an employee, rather than some form of sexual misconduct. Specifically, the language "wages, compensation, [and] benefits" is very applicable to employees being discriminated against, yet does not appear applicable to sexual harassment claims.¹³⁰ The statute also uses the catch-all "or any other form of retaliation or reprisal," which again makes sense in the context of an employee being discriminated against more than for sexual harassment.¹³¹ If this matter were litigated, it is unclear whether the EEOC's interpretation would be upheld. If it is not, then a victim of sexual harassment will be forced to include the full settlement in gross income with no deduction allowed for attorneys' fees paid.

123. I.R.C. § 62(a)(20)–(21).

124. *Id.*

125. *See id.* Attorneys' fees for the employers are also deductible above the line as trade or business expense. I.R.C. § 162(a)(1) (2017).

126. *See* I.R.C. § 62(e)(1)–(17) (2017).

127. I.R.C. § 62(e)(14) (2017); 42 U.S.C. § 2000e-2 (1991).

128. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

129. I.R.C. § 62(e)(18)(ii).

130. *Id.*

131. *Id.*

V. THE EFFECTIVENESS OF § 162(Q)

The secretive nature of NDAs makes it nearly impossible to gather data to determine the effectiveness of this reform. It is well established that this law was a reaction to the use of NDAs in high-profile sexual harassment settlements.¹³² As this article is being written, there are currently two major sexual harassment cases headed for settlement.¹³³ One is a class action against the Boy Scouts of America, where the organization is accused of improperly handling records of sexual misconduct by volunteers.¹³⁴ With the organization already considering Chapter 11 bankruptcy, it is likely to give significant weight to the tax implications of including NDAs in any settlement with victims.¹³⁵ The second case is *USA Gymnastics*, which has already filed for bankruptcy in the wake of the Larry Nassar scandal.¹³⁶ Regardless of which case settles first, they will both serve as good indicators of whether businesses are beginning to shift their behavior. However, some changes have already begun to occur in the industry, most notably with respect to 21st Century Fox (formerly related to Fox News.)¹³⁷ In 2018, 21st Century Fox settled a \$10 million sexual harassment suit filed by 18 employees without requiring any victims to enter into NDAs.¹³⁸ This is a clear break from the precedent of including NDAs in sexual harassment settlements, which was the trend with former employees like Ailes and O'Reilly.¹³⁹

Although some employers, like USA Gymnastics and the Boy Scouts of America, know that the public is watching to see if they include NDAs in settlements, the average employer in a sexual harassment case is not under the same amount of pressure. This begs the question of whether there will be different outcomes in cases hidden from the limelight. After all, only a handful of sexual harassment cases garner public attention each year out of the thousands filed with the EEOC.¹⁴⁰ Because not all employers make settlements under public scrutiny, their cost-benefit analysis for including an NDA might look quite different from entities like USA Gymnastics and the Boy Scouts of America. Companies already under public scrutiny are likely to weigh the inclusion of NDAs as being of a

132. See *supra* Part I.

133. See John Bair, *Boy Scouts of America's Bankruptcy Amid Sexual Assault Claims*, LEGAL EXAMINER (Jan. 3, 2019), <https://milestone.legalexaminer.com/legal/legal-profession/boy-scouts-of-americas-bankruptcy-amid-sexual-assault-claims/> [hereinafter *Boy Scouts*]; see also John Bair, *Will USA Gymnastics' Bankruptcy Prevent Sexual Abuse Claims from Moving Forward?*, LEGAL EXAMINER (Dec. 6, 2018), <https://milestone.legalexaminer.com/legal/will-usa-gymnastics-bankruptcy-prevent-sexual-abuse-claims-from-moving-forward/> [hereinafter *USA Gymnastics*].

134. *Boy Scouts*, *supra* note 133.

135. *Id.*

136. Larry Nassar has been accused of sexually abusing over 300 girls while working as a physician for USA Gymnastics. *USA Gymnastics*, *supra* note 133.

137. *21st Century Fox*, WIKIPEDIA, https://en.wikipedia.org/wiki/21st_Century_Fox (stating that 21st Century Fox and Fox News were no longer affiliated after the December 2017 purchase by Disney) (last updated Apr. 2, 2019).

138. Robert Wood, *As Fox Settles Suits Without Confidentiality, Will Nondisclosure Provisions Disappear?*, FORBES (May 17, 2018), <https://www.forbes.com/sites/robertwood/2018/05/17/as-fox-settles-suits-without-confidentiality-will-nondisclosure-provisions-disappear/#107a9c7cfab0>.

139. Ruiz, *supra* note 3; *Gretchen Carlson Wants Congress To Act On Sexual Harassment*, ON POINT (Oct. 25, 2017), <https://www.wbur.org/onpoint/2017/10/25/gretchen-carlson-wants-congress-to-act-on-sexual-harassment>.

140. The EEOC had over 6,000 sexual harassment cases filed with its office in 2017. Cooper, *supra* note 23, at 32.

much greater cost because of potential public backlash that might occur.¹⁴¹ However, companies not under public scrutiny might be more apt to include an NDA, especially if they think that disclosure of the harassment would be more damaging to the company than the estimated tax consequences.¹⁴² Another factor in these low-profile cases is that settlements are likely to be much lower than cases in the headlines.¹⁴³ This means that the inclusion of an NDA might be much more economically feasible than in cases like Fox News, where the tax consequences would easily be in the millions of dollars.

This problem is best illustrated by a new example, wherein an employer values a sexual harassment suit filed by an employee at \$100,000. Assume the employer has had some significant morale and brand image problems, and is willing to pay the tax consequences if it means avoiding adding to its existing image problem. If the victim has not yet spoken out about the harassment, there might be a significant benefit to the employer by including an NDA. If the benefits of ensured secrecy of the sexual harassment outweigh the tax consequences of \$21,000,¹⁴⁴ the employer may try to pressure the employee into the NDA by making it a requirement to any settlement agreement. This example illustrates how this tax reform, although a factor in the employer's decision, may not always be enough to cause employers to change their behavior and exclude NDAs. In cases where NDAs are included, the entire incident will go undetected, making it rather difficult to track the effectiveness of this legislation.

VI. WHAT § 162(Q) SHOULD PROVIDE VICTIMS OF SEXUAL HARASSMENT

As history has shown, tax reforms can be a subtle yet effective way for the government to influence the behavior of employers.¹⁴⁵ Few people would argue that how Weinstein and others have used NDAs in sexual harassment settlements is an area in much need of reform.¹⁴⁶ Unfortunately, § 162(q) was only a half-baked solution to a serious problem. The three issues identified in this article have been (1) the glaring problem of a victim's ability to deduct attorneys' fees, (2) the unconsidered issue that some victims may want the privacy that NDAs offer, and (3) the more nuanced language of the statute itself, as well as some key undefined terms.

In the future, the best solution to avoid these types of problems is a thoughtful and thorough review of the issue by legislators. Had more time and effort been given to review, there is a good chance that some of these issues would have been discovered and resolved in the committee process.¹⁴⁷ The clearest way to fix this problem is for Congress to pass legislation amending § 162(q). Such an amend-

141. See *Cost-benefit analysis*, *supra* note 81.

142. *Id.*

143. See e.g., Brian Palmer, *Is \$5,000 a Lot for a Sexual Harassment Settlement?*, SLATE (Nov. 9, 2011), <https://slate.com/news-and-politics/2011/11/herman-cain-settlement-what-s-the-going-rate-for-sexual-harassment-claims.html>.

144. \$21,000 would be the dues due on the \$100K if the settlement amount has an NDA and is non-deductible.

145. See Wood, *Weinstein Tax May Hurt Plaintiffs*, *supra* note 14 and accompanying text.

146. See *supra* Part I.

147. *The Role of Committees in the Legislative Process*, UNITED STATES SENATE, <https://www.senate.gov/general/Features/Committees.htm> (last visited Apr. 9, 2019).

ment should include: (1) clear wording that inclusion of an NDA only affects deductibility of an employer's attorneys' fees, not the victims; (2) an exception to allow for unilateral NDAs benefiting victims, so that an employee's bargaining power is not reduced if he or she wants privacy; and (3) a definition of "payments related to," as well as other key terms like "NDAs" and "sexual harassment" to decrease unnecessary litigation.

Senator Menendez proposed a bill that would have corrected the main issue of a victim's attorneys' fees not being deductible if an NDA was included in the settlement.¹⁴⁸ Unfortunately, the bill died in committee. However the bill, named "Repeal the Trump Tax Hike on Victims of Sexual Harassment," suggests that it might have been more of a political stunt.¹⁴⁹ Another concern, even if the bill would have gained traction in the committee, was how a Democrat-controlled House would respond to an amendment for a broad tax reform bill that it never supported.¹⁵⁰ Although Republicans have floated the idea of passing a single bill to correct multiple mistakes throughout the TCJA, this has not yet gained traction.¹⁵¹

If a legislative correction never materializes, the next best alternative is for a favorable interpretation of the tax law by the IRS. As mentioned before, Republicans have already sent an open letter to the IRS trying to fix the problem by clarifying their legislative intent when passing the law.¹⁵² Unfortunately, just like Menendez's bill, the letter addresses only the deductibility of attorneys' fees for victims, not the other concerns this article raises with this legislation.¹⁵³ Even though the letter was submitted by Republicans in August of 2018, the IRS has yet to issue any guidance.¹⁵⁴ If the IRS continues to remain silent, it is likely a matter of time until these issues are litigated. Although the letter might prove helpful to a tax court in determining legislative intent, this may be insufficient if the court finds the text of the law to be directly contrary to the legislative intent—which is a major concern.¹⁵⁵

VII. CONCLUSION

Section 162(q) of the Code may still prove to be an effective reform in reducing the use of NDAs in sexual harassment settlements. As discussed above, there

148. ROBERT "BOB" MENENDEZ, REPEAL THE TRUMP TAX HIKE ON VICTIMS OF SEXUAL HARASSMENT ACT OF 2018, S. 2820, 115th Cong. (2018).

149. *Id.*

150. Jeff Green et al., *Tax-Law Typo Risks Bankrupting #MeToo Victims Without GOP Fix*, BLOOMBERG (June 5, 2018, 3:00 AM), <https://www.bloomberg.com/news/articles/2018-06-05/sexual-harassment-victims-could-lose-under-tax-law-meant-to-help>.

151. The outgoing Chairman of the House Ways and Means Committee proposed the following bill to correct TCJA errors. See Kevin Brady, *Tax Technical and Clerical Corrections Act Discussion Draft*, (Jan. 2, 2019), https://republicans-waysandmeans-forms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf.

152. See Letter, *supra* note 55.

153. ROBERT "BOB" MENENDEZ, REPEAL THE TRUMP TAX HIKE ON VICTIMS OF SEXUAL HARASSMENT ACT OF 2018, S. 2820, 115th Cong. (2018).

154. See *Certain payments related to sexual harassment and sexual abuse*, *supra* note 73.

155. *Lawmakers explain TCJA errors & request that IRS guidance reflect Congressional intent pending correction*, *supra* note 72.

are multiple aspects that discourage businesses from including NDAs in settlements of this nature. However, despite Congress' best intentions, victims of sexual harassment are tragically caught in the crosshairs of this poorly drafted and ill-conceived reform. Proposals by members of Congress to "fix" this legislation only illustrate that nobody on Capitol Hill has taken the time to fully understand the implications of this law. The legislative process has always suffered from inefficiencies, but errors of this nature can be avoided if legislators stop rushing the committee process and complete a thorough and meaningful review of proposed legislation.