

THE "ME TOO" MOVEMENT AND ITS INFLUENCE ON YOUR BUSINESS TAXES

A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Claims for a sexually hostile work environment have been around since the late 1970's (the claim was recognized by the United States Supreme Court in 1986). For years, employers have adopted and modified workplace policies and practices designed to prevent the creation of a sexually-hostile work environment. As the law has evolved, so have the policies and practices. Not all efforts are successful. Some employees may ignore the prohibitions against certain conduct and mistreat other employees, or an employee believe another employee has failed to abide by the policies and the employer is responsible. Whatever the case, EEOC charges and lawsuits may follow.

In the last five years, the number of sexual harassment charges filed nationwide has remained static, hovering around the 6500 mark. There are no statistical surveys about the number of sexual harassment lawsuits filed, but we have not observed any significant increase here in Alabama. The "Me Too" movement has re-focused attention on sexual harassment in the workplace, and we anticipate an increase in the number of charges and lawsuits filed in 2018.

But this is not the only impact the "Me Too" movement.

Statistical surveys show that nationwide, employers and employees settle over 75% of discrimination lawsuits filed (which include discrimination and retaliation claims in addition to sexual hostile environment claims). Employers settle employment litigation for a multitude of reasons. The employer may have a "bad actor." At times, there may be issues with evidence or witnesses. An employer may face social pressure to resolve a lawsuit. In most cases, however, settlements are driven by economics. Simply put, it costs less to settle than to fight. To fight requires an employer to pay its own attorney to defend the case. Defending litigation has intangible burdens such as the time and resources management has to spend away from productive work for strategy meetings, depositions, and possibly trial. The potential liability is also high. An employer who loses a hostile work environment claim at trial faces the payment of a large back pay and front pay award, up to \$300,000 in compensatory and punitive damages AND the fees for the employee's attorneys.

Until this year, employers settling hostile environment claims could find some solace in the fact that the settlement proceeds could be deducted for tax purposes. This long-standing tax deduction has now given way to the "Me Too" movement. The Tax Cuts and Jobs Act, signed in to law on December 22, 2017, provides:

Payments related to sexual harassment and sexual abuse – No deduction shall be allowed under this chapter for –

- Any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or
- Attorney's fees related to such a settlement or payment.

This provision:

(1) Requires an employer to choose between a tax deduction for the settlement proceeds or a nondisclosure agreement; and

(2) Eliminates entirely the deduction for payment of a fee to the employee's attorney – regardless of whether the settlement includes a nondisclosure agreement.

The allocation of settlement amounts -- wages, non-taxable versus non-taxable damages and the amount of attorney's fees -- has always been a point of contention between employers and employees. The Tax Cuts and Jobs Act adds several points of contention to potential settlements. *However, the foremost question for employers is "how much is that nondisclosure agreement really worth."* If you need assistance answering this question, please do not hesitate to call.

David B. Walston
Christian & Small LLP
505 20th Street North, Suite 1800
Birmingham, AL 35203
(205) 250-6636
dbwalston@csattorneys.com

About Christian & Small LLP

[Christian & Small LLP](#) represents a diverse clientele throughout Alabama, the Southeast and the nation with clients ranging from individuals and closely held businesses to Fortune 500 corporations. By matching [highly experienced lawyers](#) with specific client needs, Christian & Small develops innovative, effective and efficient solutions for clients. Christian & Small focuses on the [areas of litigation and business](#) and is a member of the [International Society of Primerus Law Firms](#) and the only Alabama member firm in the [Leadership Council on Legal Diversity](#). Please visit www.csattorneys.com for more information, or contact David (dbwalston@csattorneys.com) or Jonathan (jwmacklem@csattorneys.com) directly via email.