TOO LITTLE TOO LATE: CONGRESS RAISES THE STAKES OF WORKPLACE SEXUAL HARASSMENT

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I. INTRODUCTION

In 2017, Congress enacted section 162(q)[1] of the Internal Revenue Code (IRC), which prohibits the deduction of payments and attorneys' fees

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1. Tax Cuts and Jobs Act of 2017, 26 U.S.C. § 162(q) [hereinafter "section" or "section 162(q)"].

in confidential settlement agreements related to cases of workplace sexual harassment.[2] This Note will analyze Congress's enactment of section 162(q) to address workplace sexual harassment and discuss how the section's vague language and lack of defining terms may limit its ability to deter businesses from condoning workplace sexual harassment.

Congress's enactment of section 162(q) followed a chain of publicized workplace sexual harassment cases in Hollywood.[3] In 2017, the social media hashtag #MeToo went viral after the highly revealing and publicized story of Hollywood executive Harvey Weinstein's sexual assaults.[4] #MeToo is a social media reference to the Me Too movement, an online campaign in which survivors of sexual harassment or assault share their experiences in solidarity.[5] The impact of Weinstein's story and its integral part in this movement was only made possible by the numerous employees, past and present, that bravely came forward to denounce Weinstein's inappropriate workplace conduct on behalf of the many silenced victims.[6]

Weinstein's case has been widely publicized in recent years, but workplace sexual harassment is no new phenomenon. While section 162(q) has contributed to increasing public awareness about the role that businesses play in workplace sexual misconduct, the section's broad language and lack of clarity regarding its application hinders its underlying purpose of deterring workplace sexual harassment.[7]

In Part II, this Note will introduce the history of section 162(q) and the MeToo movement and discuss Congress's intentions to enact the section to combat workplace sexual harassment.[8] In Part III, this Note will discuss the difficulties in interpreting the section due to its vague language and the

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2. *See id.*

3. Alan Feuer, *Harvey Weinstein's Dark Days*, N.Y. TIMES (Jan. 20, 2020), https://www.nytimes.com/2020/01/20/nyregion/harvey-weinstein-trial.html [https://web.archive.org/web/20210205180836/https://www.nytimes.com/2020/01/20/nyregion/harvey-weinstein-trial.html].

4. *Id*.

5. Tarana Burke, *History & Inception*, ME TOO, https://metoomvmt.org/get-to-know-us/history-inception/ [http://web.archive.org/web/20210201032641/https://metoomvmt.org/get-to-know-us/history-inception/] (last visited Feb. 5, 2021).

6. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018 4:41 PM), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/ [https://web.archive.org/web/20210130215457/https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/].

7. Stephanie Olivera Mittica & John Waters, *Harvey Weinstein, Tax Reform, and Nondisclosure—Oh My!*, JDSUPRA (Jan. 19, 2018), https://www.jdsupra.com/legalnews/harvey-weinstein-tax-reform-and-47089/ [http://web.archive.org/web/20210201012832/https://www.jdsupra.com/legalnews/harvey-weinstein-tax-reform-and-47089/].

8. *See infra* Part II.

lack of existing regulatory instruction by Congress or the Internal Revenue Service (IRS) to define key phrases such as "sexual harassment" and "nondisclosure agreement."[9] In Part IV, this Note will discuss the section's impact since its enactment, suggest solutions for defining key language, and propose that the section be amended to clarify its vague language in a way that best favors sexual harassment victims.[10] Finally, in Part V, this Note will conclude by suggesting that Congress amend section 162(q) and enact greater legislative oversight of settlement claims to firmly establish its commitment to eliminating workplace sexual harassment.[11]

II. BACKGROUND

A. P.L. 115-97; 26 U.S.C. § 162(q)

Congress enacted major tax legislation, the Tax Cuts and Jobs Act (TCJA), on December 22, 2017.[12] This substantial tax revision included a section explicitly addressing sexual harassment.[13] Section 13307 of the TCJA adds section 162(q), which provides:

> (q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—No deduction shall be allowed under this chapter for—
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> > (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) attorney[s'] fees related to such a settlement or payment.[14]

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9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified in scattered sections of 26 U.S.C.). Public Law 115-97 was enacted by the 115th Congress as an amendment of the Internal Revenue Code of 1986. *Id. See also Preliminary Details and Analysis of the Tax Cuts and Jobs Act*, TAX FOUND. (Dec. 18, 2018), https://taxfoundation.org/final-tax-cuts-and-jobs-act-details-analysis/ [http://web.archive.org/web/20210201003137/https://taxfoundation.org/final-tax-cuts-and-jobs-act-details-analysis/]. The Tax Cuts and Jobs Act (TCJA) is a tax reform bill that was initially passed by the House of Representatives on November 16, 2017, and signed by the Senate on December 2, 2017. *Id.*
13. *See* 26 U.S.C. § 162(q).
14. *Id*.

Under this section, deductions for settlement agreements or attorneys' fees related to cases involving sexual harassment or abuse are not allowed if the settlement or payments are subject to a nondisclosure agreement (NDA).[15]

Generally, taxpayers are allowed a deduction for "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business. . . ."[16] Settlement payments, judgments, and associated legal fees of defending a claim are considered "ordinary and necessary."[17] Prior to section 162(q)'s enactment, the IRC broadly allowed attorneys' fees to be deducted as long as the fees were directly connected to the business.[18] Justice Cardozo once justified the IRC's allowance for the deduction of attorneys' fees as ordinary and necessary because "payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack."[19] Justice Cardozo felt it necessary to permit the deduction of attorneys' fees because such fees will inherently accumulate for anyone seeking to resolve a legal dispute.[20]

Various deductions have been disallowed by the IRC, but before the enactment of section 162(q), there was no specific section regarding

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15. *Id*.

16. 26 U.S.C. § 162(a). *See also* Comm'r v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345 (1971). In *Lincoln Savings*, the Supreme Court established that an allowable deduction under section 162(a) of the IRC of 1954 "must (1) be 'paid or incurred during the taxable year,' (2) be for 'carrying on any trade or business,' (3) be an 'expense,' (4) be a 'necessary' expense, and (5) be an 'ordinary' expense." *Id*. at 352. Pertaining to individuals, section 212 of the IRC permits the deduction of all "ordinary and necessary expenses . . . in connection with the determination, collection, or refund of any tax." 26 U.S.C. § 212.

17. 26 U.S.C. § 162. Prior to the enactment of section 162(q), attorneys' fees were generally accepted as ordinary or necessary business expenses so long as they were reasonable. Buckingham, Doolittle & Burroughs, LLC, *Is Your Lawsuit Tax Deductible? How to Know When It Is, and Isn't, Deductible*, JDSUPRA (Nov. 8, 2019), https://www.jdsupra.com/legalnews/is-your-lawsuit-tax-deductible-how-to-76611/ [https://web.archive.org/web/20210205191321/https://www.jdsupra.com/legalnews/is-your-lawsuit-tax-deductible-how-to-76611/]. Pertaining to individuals, section 212 of the IRC permits the deduction of all "ordinary and necessary expenses . . . in connection with the determination, collection, or refund of any tax." 26 U.S.C. § 212.

18. Kornhauser v. United States, 276 U.S. 145, 153 (1928). In *Kornhauser*, the Supreme Court held that attorneys' fees were allowable as a deduction as ordinary and necessary business expenses because the fees were "directly connected with, or, as otherwise stated, proximately resulted from, his business . . . ." *Id*. (internal citations omitted).

19. Welch v. Helvering, 290 U.S. 111, 114 (1933). Justice Cardozo used "counsel fees" as an example of ordinary or necessary business expenses because they are expected to occur in the midst of any dispute. *Id.*

20. *Id*.

private settlements or NDAs in connection with sexual harassment.[21] Since the section's enactment, various media commentators have applauded its conclusion, though not without critique, as a responsive measure addressing the increasing awareness of workplace sexual harassment following a series of allegations against business moguls, actors, and television personalities in 2017.[22]

B. Section 162(q)'s Relation to the MeToo Movement

The MeToo movement arose in 2006 when Tarana Burke decided to share her personal experience of sexual assault as a method of recovery for herself and others.[23] Her goal was to ease the difficulty that individuals recovering from similar experiences of abuse face.[24] Burke coined the phrase "Me Too" and created the movement to serve as a community network for survivors and to destigmatize the experience of sexual abuse, with particular focus on women of color like herself.[25]

Burke, however, did not originate the Twitter hashtag "#MeToo."[26] Actor Alyssa Milano tweeted the hashtag in a call for women to feel comfortable and empowered to share their stories of sexual harassment to showcase unity and destigmatize the negative connotations that face victims of abuse, values that she shared with Burke.[27] Many women spoke out, including women of celebrity status, and a number of actors, public figures, and socialites were charged in 2017 with sexual harassment or

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21. MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RSCH. SERV., R45092, THE 2017 TAX REVISION (P.L. 115-97): COMPARISON TO 2017 TAX LAW 26 (2018).

22. *Disclosure vs. Deduction: Uncle Sam Speaks on Silencing Sexual Harassment Settlements*, QBE N. AM. (May 2018), https://www.qbe.com/us/-/media/north%20america/files/in-the-news/new-tax-code-provision-affects-ndas-on-sexual-harassment-settlements.pdf?la=en [http://web.archive.org/web/20210203034836/https://www.qbe.com/us/-/media/north%20america/files/in-the-news/new-tax-code-provision-affects-ndas-on-sexual-harassment-settlements.pdf?la=en].

23. Abby Ohlheiser, *Meet the Woman Who Coined the 'Me Too' 10 Years Ago – to Help Women of Color*, CHI. TRIB. (Oct. 19, 2017, 11:55 AM), https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html [http://web.archive.org/web/20210201014213/https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html].

24. *Id*.

25. *Id*.

26. *Id*. *See also #MeToo: A Timeline of Events*, CHI. TRIB. (Mar. 11, 2020, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [http://web.archive.org/web/20210201014517/https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html].

27. Ohlheiser, *supra* note 23.

rape, including Roy Price, Larry Nassar, Kevin Spacey, Roy Moore, and Harvey Weinstein.[28]

In 2018, the media continued to publicize similar allegations against other public figures, but none were more seemingly publicized than the allegations of workplace sexual assault against Weinstein.[29] Eventually, media commentators considered how Weinstein had continued to hold his position as an illustrious film and television producer: it was discovered that many allegations against him had been hidden because he had claimants sign confidentiality agreements when settling charges against him.[30] Weinstein used NDAs in conjunction with settlement agreements to silence any discussion of his alleged sexual assaults by his accusers.[31] Weinstein has since become an emblem of the MeToo movement and the general public's growing concern about workplace sexual harassment.[32] Particularly, the public's concern has grown regarding the vulnerability of employees becoming victim to workplace sexual harassment due to legal mechanisms, such as Weinstein's use of NDAs, which allow businesses to cover up instances or details of workplace sexual misconduct.[33]

Amid the Weinstein scandal, two Weinstein Company officials anonymously reported to *The New York Times* that Weinstein had settled at least eight different sexual assault cases with an NDA.[34] "Mr. Weinstein enforced a code of silence," as evidenced by employee contracts prohibiting criticism of the Weinstein Company or its leaders.[35] The media's attention to these allegations combined with the viral internet reach of the MeToo movement was telling: it was clear that a business may attempt to salvage its reputation among consumers and employees by

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28. *Id*. Other notable figures who faced charges of sexual harassment or other forms of sexual misconduct included Louis C.K., Matt Lauer, Garrison Keillor, Russel Simmons, U.S. Sen. Al Franken, and more. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230, 231–32 (2018).

29. *See* Mittica & Waters, *supra* note 7.

30. Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES, (Dec. 5, 2017), https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html?mtrref=www.google.com&assetType=PAYWALL [http://web.archive.org/web/20210201014906/https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html?mtrref=www.google.com&gwh=E1744A4BE093281D1D22971622CE659C&gwt=pay&assetType=PAYWALL].

31. *Id*.

32. *See id*. *See also* Tippett, *supra* note 28.

33. *See* Tippett, *supra* note 28.

34. Twohey et al., *supra* note 30.

35. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [http://web.archive.org/web/20210201111523/https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html].

prohibiting sexual harassment claimants from sharing their stories.[36] As a result, section 162(q) is often referred to as the "Weinstein Tax," due to its explicit attempt to address the kinds of issues seen in these publicized cases of workplace sexual harassment.[37]

Shortly after section 162(q) was enacted, U.S. Senator Bob Menendez, senior member of the Senate Finance Committee and the Congressman who initially proposed the inclusion of the new section in the 2017 tax reform, expressed his frustrations with its language.[38] Particularly, Senator Menendez feared that the vague language of the section would hinder its effectiveness.[39] Menendez proposed the initial amendment to the section to "both protect victims of sexual misconduct while ending the practice of taxpayers subsidizing the bad behavior of corporations or executives."[40] Menendez further expressed his fear that victims of sexual harassment may be further victimized by the section's vague language.[41] Despite Menendez's concerns, his proposal of the new section and Congress's willingness to adopt a section specifically addressing workplace sexual harassment is evidence of Congress's initial intent that the legislation was meant to combat the occurrence of sexual misconduct.[42]

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36. *See id*.

37. *Id*. *See also* 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/#5f7e9eed463d [http://web.archive.org/web/20210201015042/https://www.forbes.com/sites/robertwood/2018/01/03/ironically-weinstein-tax-on-sexual-harassment-settlements-may-hurt-plaintiffs-too/].

38. *Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, BOB MENENDEZ (Dec. 21, 2017), https://www.menendez.senate.gov/newsroom/press/menendez-calls-on-gop-to-fix-its-tax-bill-to-protect-victims-of-workplace-sexual-misconduct [http://web.archive.org/web/20210203044933/https://www.menendez.senate.gov/newsroom/press/menendez-calls-on-gop-to-fix-its-tax-bill-to-protect-victims-of-workplace-sexual-misconduct].

39. *Id*. Senator Menendez introduced the addition of section 162(q) in response to the #MeToo movement to protect victims of sexual misconduct and prevent the businesses from writing off legal fees associated with sexual misconduct claims. Shane Rader, *The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements*, 3 BUS., ENTREPRENEURSHIP & TAX L. REV. 329 (2019).

40. *See Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38.

41. *Id*. *See also* 26 U.S.C. § 162(q).

42. *See Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38.

C. Litigating Sexual Harassment Claims: Title VII

Today, workplace sexual harassment is federally regulated by Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination on the basis of sex in employer and employee relationships.[43] The statute provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[44]

Title VII also created the Equal Employment Opportunity Commission (EEOC), an administrative agency charged with enforcing Title VII's prohibition of discrimination on the basis of "race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age, (forty or older), disability, or genetic information."[45] The EEOC is vested with the authority to investigate employers who have been charged with any of the above forms of discrimination.[46] Regarding sexual misconduct, the EEOC prohibits sexual harassment, considering it a form of sex-based discrimination, which "involves treating someone (an applicant or employee) unfavorably because of that person's sex."[47]

The EEOC notes that, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when . . . this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment."[48]

Title VII prevents sexual harassment in two forms: quid pro quo and hostile work environment.[49] Quid pro quo sexual harassment occurs when

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43. *See Facts About Sexual Harassment*, EEOC, https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment [http://web.archive.org/web/20210203051706/https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment] (last visited Feb. 3, 2021).

44. 42 U.S.C. § 2000e-3(a) (1972).

45. *Overview*, EEOC, https://www.eeoc.gov/overview [http://web.archive.org/web/20210201015433/https://www.eeoc.gov/overview] (last visited Feb. 25, 2020).

46. *Id*.

47. *Sex-Based Discrimination*, EEOC, https://www.eeoc.gov/sex-based-discrimination [http://web.archive.org/web/20210201015624/https://www.eeoc.gov/sex-based-discrimination] (last visited Apr. 5, 2020).

48. *See Facts About Sexual Harassment*, *supra* note 43.

49. *Sexual Harassment: History of Legislation, Judicial Precedent Set by U.S. Supreme Court, Bill Passed Allowing Damages for Victims of Sexual Harassment*, JRANK https://law.jrank.org/pages/22670/Sexual-Harassment.html [http://web.archive.org/web/

an employer, or other individual in an authoritative position, directly requests sexual favors from an employee in exchange for a benefit.[50] Sexual harassment in the context of a hostile work environment occurs when an employee is made to feel uncomfortable by unwelcome sexual advances by an employer, so much so that the work environment has become hostile or abusive.[51] Circumstances surrounding hostile work environments can include: the frequency of misconduct, severity of the misconduct, the type of misconduct, and whether an employee's work performance has been affected by the misconduct.[52]

An individual does not need to be directly harassed to bring forth claims under Title VII for gender discrimination but may file a claim if they have been impacted in any way by the workplace misconduct.[53] Additionally, in no circumstance is the harassment required to result in economic injury or loss of employment to be regulated under Title VII.[54] Relationships included in the EEOC's definition of sexual harassment—and, therefore, regulated under Title VII—also include same-sex harasser and harassed, and a harasser acting as a supervisor of the harassed, as an agent of the employer, as a supervisor in any area, as a co-worker, and as a non-employee.[55]

Under Title VII, an employer is vicariously liable if a supervisor creates a hostile work environment through sexual harassment.[56] In response to sexual harassment allegations, an employer may avoid liability in two circumstances: (1) the employer can prove that it "reasonably tried

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20210201015927/https://law.jrank.org/pages/22670/Sexual-Harassment.html] [hereinafter *Sexual Harassment: History of Legislation*] (last visited Feb. 3, 2021).

50. *See id.* Examples of quid pro quo sexual harassment include an employer requesting sexual favors in exchange for providing an employee with some benefit related to their employment such as a raise, permission to keep their job, or promotion. *Id.*

51. *Id*. *See also* Khadija Murad, *Sexual Harassment in the Workplace*, NCSL (Feb. 17, 2020), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx#Sexual%20Harassment%20in%20the%20Workplace [http://web.archive.org/web/20210125050113/https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx]. Examples of a hostile work environment may include situations when an employee experiences anxiety due to unwanted sexual advances. *Sexual Harassment: History of Legislation*, *supra* note 49.

52. *See Harassment*, EEOC, https://www.eeoc.gov/laws/types/harassment.cfm [http://web.archive.org/web/20210130223427/https://www.eeoc.gov/harassment] (last visited Feb. 25, 2020).

53. *Id*.

54. *Id*. *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). The Supreme Court specified that for sexual harassment "to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id*. at 67 (alteration in original).

55. *See Harassment*, *supra* note 52.

56. *Id*.

to prevent and promptly correct the harassing behavior," or (2) the employer can prove that "the employee unreasonably failed to take advantage of any preventive or corrective opportunities."[57]

D. The Supreme Court's Addressment of Sexual Harassment

Despite Title VII's enactment in 1964 and its creation of the EEOC, the Supreme Court failed to address sexual harassment until 1986 in *Meritor Savings Bank v. Vinson*, where the court held that an employee had a valid claim for sexual harassment because her supervisor had subjected her to unwelcome sexual advances.[58] This was the first case in which the Supreme Court held sexual harassment to be a Title VII violation and was essential in providing victims of sexual harassment with a legal remedy.[59] The Supreme Court further addressed the rights of sexual harassment litigants in the following years by specifying that an employer can be held liable for the actions of its employees, as well as specifying that a case of sexual harassment is not impacted by the gender of the involved parties.[60]

III. PROBLEM

A. Failure to Define Sexual Harassment

As Senator Menendez pointed out, section 162(q) lacks clarity.[61] The section fails to define terms that are necessary for its application, including

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57. *Id*.

58. *Meritor Sav. Bank*, 477 U.S. at 57 ("A claim of hostile environment sex discrimination is actionable under Title VII."). In this case, the Supreme Court denounced the uncomfortable or inappropriate behavior by supervisors, noting that their "responsibilities do not begin and end with the power to hire, fire, and discipline employees," but rather that supervisors are responsible for "ensuring safe, productive workplace[s]." *Id.* at 76 (Marshall, J., concurring).

59. *Id*. *See also* Stuart Taylor Jr., *Sex Harassment on Job Is Illegal*, N.Y. TIMES (June 20, 1986), https://www.nytimes.com/1986/06/20/us/sex-harassment-on-job-is-illegal.html [http://web.archive.org/web/20210203055503/https://www.nytimes.com/1986/06/20/us/sex-harassment-on-job-is-illegal.html].

60. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 1105 (1998) (reversing the judgment of the U.S. Court of Appeals for the Eleventh Circuit and holding that employers may be liable for their personnel). *See also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (affirming an employer's right to present an affirmative defense to a claim of sexual harassment); Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998) (holding that sexual harassment under Title VII may be between same-sex parties).

61. *See Menenedez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38. Senator Menendez introduced the addition of section 162(q) in response to the #MeToo movement to protect victims of sexual misconduct and

sexual harassment or sexual abuse.[62] The IRS has also failed to provide regulatory guidance on how to interpret these key phrases in section 162(q).[63]

While the section fails to define or reference any other sources that define these terms, the Merriam-Webster dictionary defines sexual harassment as "uninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student)."[64] A fairly new definition, the concept of sexual harassment only recently came to light in the 1970s by feminist author and activist Lin Farley.[65] Despite only having been defined recently, the physical and psychological acts imposed on individuals being harassed occurred long before any concrete definition was developed.[66]

Farley defined sexual harassment as, "Any repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job."[67] She first introduced the term at a Human Rights Commission hearing on women in the workplace in 1975.[68] Farley had hoped that introducing a term for sexually explicit behavior directed towards women in the

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prevent the businesses from writing off legal fees associated with sexual misconduct claims. *See* Rader, *supra* note 39.

62. *See* 26 U.S.C. § 162(q).

63. *See* Mittica & Waters, *supra* note 7.

64. *Sexual Harassment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sexual%20harassment [http://web.archive.org/web/20210203062510/https://www.merriam-webster.com/dictionary/sexual%20harassment] (last visited Feb. 2, 2021).

65. Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1584 (2018). *See also* CATHERINE A. MACKINNON & REVA B. SIEGEL, DIRECTIONS IN SEXUAL HARASSMENT LAW 8 (2003). The act of sexual harassment can be traced back to the historical treatment of women, including the sexual mistreatment of enslaved African American women, domestic servants, and female factory workers. *Id*. at 1–3.

66. MACKINNON & SIEGEL, *supra* note 65, at 1–3. *See also* Amanda Reed, *A Brief History of Sexual Harassment in the United States*, NAT'L ORG. FOR WOMEN (May 7, 2013), https://now.org/blog/a-brief-history-of-sexual-harassment-in-the-united-states/ [http://web.archive.org/web/20210130223636/https://now.org/blog/a-brief-history-of-sexual-harassment-in-the-united-states/]. Women have historically been subjected to coercion and unwanted sexual advances while working or being forced to work in unequal power dynamics. Prior to sexual harassment becoming legally actionable, women were offered resources such as guidebooks that advised them how to respond to unwelcome sexual harassment. *Id.*

67. *See* Hemel & Lund, *supra* note 65, at 1594 (quoting LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 20 (1978)).

68. Lin Farley, *I Coined the Term 'Sexual Harassment.' Corporations Stole It.*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html [http://web.archive.org/web/20210201020752/https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html].

workforce would increase awareness of the epidemic.[69] She also anticipated that introducing a definition would help empower and protect women by providing them with a way to describe their experiences.[70] Similar to the goals of Senator Menendez and those of the MeToo movement, Farley hoped that the term would empower women to share their experiences publicly and ultimately put an end to workplace sexual harassment.[71]

Unfortunately, as demonstrated by the enactment of section 162(q) in the new tax reform, workplace sexual misconduct continues to alarmingly persist.[72] Farley's term, although developed nearly four decades ago, remains useful in the modern MeToo era, as it aligns with many present-day circumstances of sexual harassment.[73] First, it specifically points to a person being made to feel uncomfortable in workplace settings due to unwanted sexual advances, one of Congress's primary concerns in enacting section 162(q).[74] Second, Farley's definition includes physical and non-physical intrusions on a body, encompassing a wide-range of situations that may fall into the category of sexual harassment.[75] This is important, as experiences of sexual harassment vary among individuals and include an array of different scenarios.[76]

Congress's failure to define the terms "sexual harassment" or "sexual abuse" within the section or to refer to another regulatory source, such as the definition provided by the EEOC, creates confusion as to what situations or experiences it regulates. This undermines Farley's very purpose of first creating a definition as well as Congress's reasons for adopting section 162(q): to unify victims of abuse and deter businesses from enabling sexual misconduct.[77] Without a clear definition, it is unclear whether section 162(q) will actually serve as a deterrent as intended. Such confusion may even disincentivize plaintiffs from initially filing a claim for sexual harassment if they do not believe their employers will face repercussions.

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69. *Id*.
70. *Id*.
71. *Id*.
72. *See Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38.
73. *See* Hemel & Lund, *supra* note 65, at 1595.
74. *Id*.
75. *Id*. at 1594.
76. *Id*.
77. *See* Farley, *supra* note 68; *see also Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38.

B. Failure to Clarify Included Forms of Nondisclosure Agreements

The MeToo movement has brought to light instances, such as Weinstein's, of sexually-harassing-repeat-offender employers, where the harassment goes unnoticed or is covered up by the employer's use of legal mechanisms, such as NDAs, to silence victims.[78] Section 162(q) disallows a deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to" an NDA.[79]

An NDA is a form of a confidentiality agreement, which prevents an individual from sharing information specified as confidential between the involved parties.[80] Confidentiality agreements may include nondisclosure provisions in addition to other sections such as non-compete provisions, whereas an NDA specifically addresses particular private information.[81] Section 162(q), however, does not clarify whether the term "NDA" should be broadly construed to include all forms of confidentiality agreements or narrowly read to only apply to agreements that have specifically been labeled as NDAs.[82]

Settlements of sexual harassment or unlawful discrimination cases under Title VII regularly contain NDAs either as an additional free-standing document or as a confidentiality clause within a larger text.[83] The purpose of these contractual agreements is to prevent employees from disclosing information about the claim, allegations, and payment for the settlement of the claim.[84] These agreements can, therefore, be used to prohibit claimants from sharing information about a settlement or sexual harassment or abuse claim, as the information would become

78. Scott Raynor, *How Harvey Weinstein's 'Secret Weapon' Led to a Nationwide Re-evaluation of the Non-disclosure Agreement*, EVERFI (Nov. 23, 2020), https://everfi.com/insights/blog/harvey-weinstein-sexual-harassment-secret-weapon-non-disclosure-agreement/ [http://web.archive.org/web/20210203070118/https://everfi.com/blog/workplace-training/harvey-weinstein-sexual-harassment-secret-weapon-non-disclosure-agreement/].

79. *See* 26 U.S.C. § 162(q).

80. Confidentiality and Nondisclosure Agreements, Practical Law Practice Note 7-501-7068. Nondisclosure agreements are free-standing confidentiality agreements. *Id.*

81. *Id.*

82. *See* 26 U.S.C. § 162(q).

83. Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12 (2018). *See also* Confidentiality and Nondisclosure Agreements, *supra* note 80.

84. Fromholz & Laba, *supra* note 83. *See* also Richard E. Kaye, *Causes of Action for Breach of Confidentiality or Nondisclosure Agreement in Employment Contract*, 47 CAUSES ACTION 2D 115 (2011) ("Confidentiality or nondisclosure agreements are intended to prevent employees from competitively using information acquired through the employment governed by the contract."); Twohey et al., *supra* note 30.

confidential.[85] In such cases, the primary purpose of these agreements is to protect an employer's interest.[86] For instance, in Weinstein's case, the corporation may have seen the use of confidentiality agreements as a protective tool to maintain the company's reputation rather than face potential backlash if the public were to find out about Weinstein's sexual misconduct.[87]

Weinstein's case has made clear that NDAs have the potential to be abused by corporations and used as a means to silence an employee's experience in the interest of salvaging a business's reputation.[88] The EEOC does not regulate or prohibit the use of NDAs, but to prevent victims from being silenced, Title VII has addressed their rights to file a claim by prohibiting settlement agreements in employment cases that would bar an employee from filing charges or assisting in investigations with the EEOC.[89] While individuals are able to bring forth a claim for recovery, the voice and autonomy of victims of sexual harassment may still be suppressed if they are coerced or pressured into signing an NDA and, therefore, disallowed from freely sharing their experiences if they desire.[90] Additionally, prohibiting employees from sharing such information places other current or future employees at risk, as they will remain unaware of the potential sexual misconduct in the workplace.

C. Potential Partial Deduction of Attorneys' Fees

Section 162(q) explicitly disallows the deduction of attorneys' fees related to "any settlement or payment" in sexual harassment cases.[91] To date, it is still unclear whether Congress intended that the settlement or payments be "related to" all costs incurred during litigation or solely those involved in reaching a settlement agreement.[92] Section 162(q) has not provided guidance regarding how to proceed in a case with multiple claims or in a situation where an employer desires to segregate claims to receive a partial tax deduction for additional claims that may be separated from a

85. *See* Fromholz & Laba, *supra* note 83.

86. *See* Confidentiality and Nondisclosure Agreements, *supra* note 80.

87. *See* Kantor & Twohey, *supra* note 35.

88. *Id.*

89. 42 U.S.C. § 2000e-3(a) (1972). *See also* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Non-waivable Employee Rights Under EEOC Enforced Statutes, No. 915.002 (Apr. 10, 1997).

90. *See* Fromholz & Laba, *supra* note 83.

91. *See* 26 U.S.C. § 162(q).

92. *Id*. Neither section 162(q) nor the IRS has provided guidance on how to define the phrase "related to." *Section 162(q) FAQ*, IRS (Nov. 24, 2020), https://www.irs.gov/newsroom/section-162q-faq [http://web.archive.org/web/20210201021752/https://www.irs.gov/newsroom/section-162q-faq] (last visited Feb. 25, 2020).

sexual harassment claim.[93] It is, therefore, unclear whether all attorneys' fees are barred from deduction under the section or whether merely a portion of attorneys' fees are deductible by other means.[94]

In January 2020, the IRS directed the public to look to Publication 525, Taxable and Nontaxable Income, for information regarding whether attorneys' fees may be partially deductible.[95] Publication 525, Taxable and Nontaxable Income, lists various attorneys' fees and costs that an employer is able to deduct, but it does not address multiple claims or sexual harassment specifically.[96] Litigation is also not always initially entered into with the goal of agreeing to a settlement. While sexual harassment claims may be more likely to settle, it is not certain.[97] At face value, the section seems to disallow the deduction of all attorneys' fees.[98] However, if read this way, attorneys' fees may include costs incurred from the immediate onset of the case, even if an employer or attorney did not initially intend to enter into a confidential settlement.[99]

While plaintiffs may be able to recover more through settlement agreements than a trial verdict, the decision not to appear in court does not come without risk, as settlement offers can be unpredictable.[100] In negotiations, the more willing a defendant is to settle, the larger the settlement amount may be for the plaintiff.[101] This norm, however, is

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93. *See* 26 U.S.C. § 162(q).

94. *Id.*

95. *Section 162(q) FAQ*, *supra* note 92.

96. I.R.S. Pub. No. 525, Cat. No. 15047D (Feb. 2020).

97. Mona Chalabi, *Sexual Harassment at Work: More Than Half of Claims in U.S. Result in No Charge*, GUARDIAN (July 22, 2016, 12:30 PM), https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-ailes-fox-news [http://web.archive.org/web/20201109010845/https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-ailes-fox-news]. It is less common for sexual harassment cases to be held in favor of the plaintiff. Individuals, therefore, may be more likely to settle up front. *Id. See also* Hemel & Lund, *supra* note 65, at 1609–10. The unlikelihood of a favorable outlook for victims of sexual harassment is in addition to the desire of corporations to retain privacy and confidentiality. *Id.*

98. *See* 26 U.S.C. § 162(q). *See also* Mitchell M. Gaswirth, 71 USC Law School Institute On Major Tax Planning P 902, 16 (2019). The section does not specify what type of payments or costs qualify as attorneys' fees. Neither Congress nor the IRS has discussed the potential to divide claims into "deductible and non-deductible buckets." *Id.* at 21.

99. Gaswirth, *supra* note 98, at 21.

100. Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html [http://web.archive.org/web/20210125222327/https://www.nytimes.com/2008/08/08/business/08law.html]. "In just [fifteen] percent of cases, both sides were right to go to trial meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered." *Id*.

101. *See Settlements*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/settle

challenged by section 162(q), which prohibits previously deductible costs of settlement payments involving NDAs in cases of sexual harassment.[102] Section 162(q) was proposed with the hope that by disallowing deductions, employers may be less inclined to enter into confidential settlement agreements.[103] On the other hand, employers may also be incentivized to continue settling cases of sexual harassment and instead offer claimants lower settlement payments to recoup the lost opportunity for a deduction for the settlement payment and its attorneys' fees.[104]

D. Impact on Plaintiffs

Section 162(q) also does not contain any language that provides guidance as to whether plaintiffs are prohibited from deducting attorneys' fees, like their employers, or whether the section's limitations solely apply to businesses.[105] If plaintiffs were prohibited from receiving a deduction, as businesses now are, they would face further harm by the disallowance of a deduction from the burdensome economic cost of litigation.[106] Disallowance of attorneys' fees for plaintiffs, even if partial, therefore, could disincentivize them from pursuing litigation altogether.[107] This

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ment#8 [http://web.archive.org/web/20210201022046/https://www.workplacefairness.org/settlement#8] (last visited Mar. 1, 2020). Employers are concerned with both the current litigation as well as the possibility of being sued again in the future. Settlement agreements may incentivize businesses to use them to protect their reputations as well as prevent the litigant from filing future claims. One way in which defendants may further ensure the silence of plaintiffs is by including a forfeiture or penalty provision, which would take effect if the plaintiff breaches the agreement. This type of provision may further incentivize businesses to feel comfortable making larger settlement offers, as they may feel that their offers are more protected. *Id.*

102. *See* 26 U.S.C. § 162(q).

103. *See Menendez Calls on GOP to Fix Its Tax Bill to Protect Victims of Workplace Sexual Misconduct*, *supra* note 38. The disallowance of a deduction acts as an economic incentive not to enter into settlement agreements that would be regulated under section 162(q). *Id.*

104. Gaswirth, *supra* note 98, at 15.

105. *See* 26 U.S.C. § 162(q). *See* Wood, *supra* note 37. *See also* Robert W. Wood, *Harvey Weinstein Tax May Hit Both Plaintiffs and Defendants*, A.B.A. BUS. L. SEC. (Feb. 14, 2018), https://businesslawtoday.org/2018/02/harvey-weinstein-tax-may-hit-both-plaintiffs-and-defendants/ [http://web.archive.org/web/20210201022203/https://businesslawtoday.org/2018/02/harvey-weinstein-tax-may-hit-both-plaintiffs-and-defendants/].

106. *See* Wood, *supra* note 105. *See also* Gaswirth, *supra* note 98; Wood, *supra* note 37. Had the tax code applied to plaintiffs, those who bring forth the claim for sexual harassment, individuals may have been disincentivized from pursing legal remedies due to the economic burdens of litigation. *Id.*

107. Wood, *supra* note 37. If individuals are disincentivized from bringing forth claims, it could result in fewer settlement agreements and essentially render section 162(q) useless. *Id.*

would essentially render the section impractical; victims of sexual harassment would be no more—if not less—protected than they were before the enactment of section 162(q), and businesses still would not face repercussions for settling cases of sexual harassment.[108] In response to these fears, on June 28, 2019, the IRS issued a statement that section 162(q) does not preclude recipients or the beneficiaries of settlements related to sexual harassment claims involving an NDA from deducting attorneys' fees, though this is still not reflected in the section itself.[109] Further, this clarification does not entirely protect such recipients economically, as litigants may still fall victim to paying higher litigation costs or from receiving lower settlement agreements.[110]

IV. ANALYSIS

A. Increased Rate of Sexual Harassment Claims Filed

According to a report regarding sexual harassment charges filed with the EEOC, the EEOC received over 7,500 charges alleging sexual harassment in 2019.[111] Further, the number of claims resulting in settlement decreased from 995 in 2010 to 692 in 2019.[112] Though it is difficult to find a direct correlation, statistical evidence, such as the report released by the EEOC, suggests that the increasing awareness and concern of workplace sexual harassment has led to an increase of allegations and a decrease of settlements at the EEOC level during the MeToo era.[113]

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108. *Id*.

109. *Section 162(q) FAQ*, *supra* note 92.

110. *See infra* Part IV.E.

111. *Enforcement & Litigation Statistics: Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2019*, EEOC https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [http://web.archive.org/web/20210201022248/https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019]. These statistics include only sex-based harassment allegations filed with the EEOC. *Id. See also Enforcement & Litigation Statistics: Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 – FY 2011*, EEOC https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm [http://web.archive.org/web/20210201022335/https://www.eeoc.gov/statistics/sexual-harassment-charge seeoc-fepas-combined-fy-1997-fy-2011]. This source provides combined data of charges of sexual harassment claims filed with both the EEOC and the Fair Employment Practice Agency. *Id.*

112. *See Enforcement & Litigation Statistics: Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2019*, *supra* note 111.

113. *Id*. *See also* Alex Press, *Women Are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation.*, VOX (May 9, 2019, 3:50 PM), https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eeoc-

The support of the MeToo movement seems to have helped destigmatize experiences of sexual harassment and encourage more women to come forward with their stories, despite potential negative repercussions that may accompany their decisions.[114] Individuals who come forward often face public scrutiny for their allegations and may be apprehensive of pursing litigation out of fear of being publicly judged or shamed.[115] Victims of sexual harassment may also be unwilling to come forward if they are struggling internally or emotionally with their experiences of being harassed.[116]

It is unclear whether the tax reform has had an impact on litigants' choices to pursue claims for sexual harassment. However, it is possible that individuals feel more comfortable coming forward with their experiences knowing that Congress opposes the current ability of corporations to avoid financial or social repercussions for their employees' misconduct and their complicit participation in addressing such behavior.

B. Define Sexual Harassment as Defined Under Title VII by the EEOC

As aforementioned, one of the most noticeable oversights of section 162(q) is its failure to define sexual harassment or abuse.[117] Neither Congress nor the IRS has made any indication that the term sexual harassment should refer to the definition provided by the EEOC, despite its regulation under Title VII. This lack of direction is concerning because individual states may have state legislation defining sexual harassment that may differ from the federal definition set forth by the EEOC.[118] Due to the section's lack of clarity, it is unclear whether a sexual harassment claim brought in state court would be regulated by the state's definition or the federal definition provided by the EEOC. [119]

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complaints [http://web.archive.org/web/20210201022455/https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eeoc-complaints].

114. Ksenia Keplinger et. al., *Women at Work: Changes in Sexual Harassment Between September 2016 and September 2018*, PLOS ONE (July 17, 2019), https://doi.org/10.1371/journal.pone.0218313 [https://web.archive.org/web/20210206200205/https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0218313].

115. *Id*. Individuals who come forward with allegations of sexual assault fear punishment in terms of further mistreatment at work or harm to their reputations. *Id.*

116. *Id*. Women who have experienced sexual harassment or other forms of sexual misconduct have reported experiencing shame and lowered self-esteem. *Id.* These feelings have been attributed to the negative connotations of sexual harassment as well as the victims' fears of societal repercussions to their reputations. *Id.*

117. *See* 26 U.S.C. § 162(q).

118. *See* Rader, *supra* note 39.

119. *Id*.

Furthermore, even if Congress intended for the term sexual harassment to reference the EEOC's definition, it remains unclear how to distinguish sexual harassment from sexual abuse. Neither Title VII nor the EEOC has explicitly defined sexual abuse.[120] However, the term has been defined by the Merriam-Webster dictionary as "the infliction of sexual contact upon a person by forcible compulsion."[121] The word "compulsion" suggests that allegations or experiences of sexual abuse may also be governed under Title VII, as the phrase "forcible compulsion" alludes to unwanted sexual advances, which would likely be included in the EEOC's definition of sexual harassment.[122] That being said, if a case alleging sexual abuse were to be defined by state legislation, it is still unclear whether a plaintiff's allegation of abuse would satisfy the state's definition.[123]

If this scenario were to occur and prohibit an individual from pursuing an allegation of sexual misconduct, the result would be inconsistent with the very purpose of section 162(q), as a plaintiff may also be prohibited from receiving any form of remedy for their harm, while their employer would not face repercussions. Section 162(q), therefore, would be more effective if it were to directly specify that sexual harassment and abuse refer to the EEOC's definition of sexual harassment as governed by Title VII. Alternatively, Congress or the IRS could also release a clarifying statement defining the terms or refer the public to Title VII for guidance regarding how to define the vague terms.

C. Prohibition of All Confidentiality Agreements

Section 162(q) fails to clarify the types of provisions or agreements encompassed by the term "nondisclosure agreement."[124] It is, therefore, unclear whether employers may require an employee to sign other forms of confidentiality agreements that would not prevent them from receiving a deduction.[125] For example, a settlement agreement may also contain a

120. 42 U.S.C. § 2000e (2021). *See also* 42 U.S.C. § 2000e-3 (1972).

121. *Sexual Abuse*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/sexual%20abuse [http://web.archive.org/web/20201111171056/https://www.merriam-webster.com/legal/sexual%20abuse] (last visited Feb. 3, 2021).

122. *See Facts About Sexual Harassment*, *supra* note 43.

123. *See* Rader, *supra* note 39, at 340.

124. *See* 26 U.S.C. § 162(q).

125. *Id*. *See also* Joe Rivera & Kyle Knas, *The Impact on Settlement of Employment Claims*, 46 TODAY'S CPA 32, 35–36 (2019), https://www.tscpa.org/docs/default-source/communications/2019-today's-cpa/january-february/tcja-settlementemployment claims-jan-feb2019-today'scpa.pdf?sfvrsn=a565f2b1_4 [http://web.archive.org/web/20210201022623/https://www.tx.cpa/docs/default-source/communications/2019-today's-cpa/january-february/tcja-settlementemploymentclaims-jan-feb2019-today'scpa.pdf?sfvrsn=a

non-disparagement clause, which could also prevent an employee from discussing claims of sexual harassment.[126] Such an agreement could even be used to outline the particular language for an employee to use when asked about the case or litigation.[127] Section 162(q) also fails to address the use of boilerplate agreements.[128] If these other forms of confidentiality agreements are descriptive enough, the employee may be so limited that an NDA is unnecessary, allowing a business to enter into a settlement agreement without fear of being disallowed a deduction.[129]

Whether these provisions are included under the definition of an NDA directly impact whether a deduction will be permitted. In order to avoid such situations, section 162(q) should be amended to include a statement specifically explaining what types of provisions or agreements fall under the category of NDAs for the purpose of the tax code. The most beneficial description of NDAs under the tax code would be a broad definition that prohibits all forms of confidentiality agreements and mechanisms that businesses may enact in an attempt to avoid regulation under section 162(q). Such a definition would prevent victims from being silenced by other forms of confidentiality agreements.

D. Prohibition of Deductions for ALL Attorneys' Fees

To date, it remains unclear whether Congress intended for section 162(q) to broadly disallow the deduction of all attorneys' fees associated with a case of sexual harassment.[130] If so, attorneys may be incentivized to discuss the potential for settlement at the onset of a sexual harassment case to avoid an unexpected settlement for which their fees are no longer deductible to their client.[131] Attorneys also may become more hesitant to take on such cases because they still may be more likely to result in settlements involving an NDA or other form of confidentiality agreement.[132]

If Congress did not intend for the section to disallow "all" attorneys' fees associated with the claim from the beginning, it is questionable whether employers would be as disincentivized from entering into a private settlement agreement. If the section allowed for a deduction of pre-settlement or other associated fees, employers may still be willing to enter

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126. *Id*.
127. *Id*. at 36.
128. *Id*.
129. *Id*.
130. *Id*. *See also infra* Part IV.E.
131. *See* Rivera & Knas, *supra* note 125. *See also* Glater, *supra* note 100.
132. *Id*.

into a settlement regulated under section 162(q), as they would still receive a partial deduction.[133] To ensure the section fully benefits the plaintiff, the section should be amended to disallow all attorneys' fees accumulated from the claim to increase the economic repercussions of settling such cases with an NDA.

E. Impact of Section 162(q) on Litigants

In any type of litigation, there exists a power dynamic between parties.[134] Any change in litigation costs may affect this dynamic, especially in cases where one party is motivated to silence the dispute.[135] In cases where an employer is especially concerned with maintaining confidentiality, such as those regarding instances of sexual harassment, an employer may be more willing to offer higher settlement payments to avoid publicizing misconduct in the workplace.[136] Compared to their employer, however, an employee bringing forth a claim of sexual harassment may be at a great disadvantage in terms of money and legal representation.[137] An employer's willingness to settle a claim—particularly one that could impact its future or public reputation—may, therefore, encourage the employer to settle quickly by offering more money to ensure silence. However, this may be undermined if the employer is aware that it will later lose costs due to being disallowed a deduction.

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133. *See* 26 U.S.C. § 162(q). The disallowance of a deduction for attorneys' fees is only prohibited if the fees are "related to" the settlement of sexual harassment claims that also use an NDA. *Id.* If attorneys' fees are considered "related to" the settlement of the claim, rather than the entire litigation process surrounding the claim, not all fees would be disallowed under section 162(q). Businesses may, therefore, receive a decreased deduction but not a total loss of a potential deduction and be less incentivized not to enter into such a settlement.

134. *See* Hemel & Lund, *supra* note 65, at 1596. Regarding section 162(q), instances of workplace sexual harassment inherently result from unequal power dynamics due to the employer-employee relationship. These cases directly result from an employer using a position of power or threat of being co-workers to harass the other individual. In many of these cases, individuals feel coerced due to the promise of career advancements or fear of repercussions to their career.

135. *Id*. at 1612. *See also* Rader, *supra* note 39, at 337. Businesses will likely perform a cost-benefit analysis of whether to enter into a settlement or use an NDA, which can adversely affect plaintiffs depending on whether they would prefer to sign an NDA. *Id.*

136. *See* 26 U.S.C. § 162(q). *See also* Rivera and Knas, *supra* note 125, at 35.

137. *See Remedies for Employment Discrimination*, EEOC, https://www.eeoc.gov/employers/remedies.cfm [http://web.archive.org/web/20210201022736/https://www.eeoc.gov/employers/remedies-employment-discrimination] (last visited Jan. 29, 2021). The recovery amount of compensatory and punitive damages is limited "depending on the size of the employer." *Id*.

Additionally, employers may still be disincentivized from pursuing litigation that would result in their receiving a deduction of fees if they more heavily weigh their company's privacy over any interest in the economic benefit they may receive from such deductions.[138] In this case, a plaintiff may not suffer a decreased settlement offer but could still be pressured or coerced into silence. To avoid this effect, it is essential that Congress respond to the remaining questions regarding the application of section 162(q) due to its vagueness. For example, Congress should address the type of attorneys' fees covered by section 162(q). Because of the increased economic burden of pursuing settlements regulated by section 162(q), businesses may be less likely to weigh the cost of litigation with other priorities such as confidentiality or reputation.[139]

F. A Litigant's Right to Confidentiality

Because section 162(q) does not distinguish between situations where an employee or employer initiates or prefers signing an NDA, the disallowance of a tax deduction will apply even in situations where a plaintiff has intentionally requested the inclusion of an NDA.[140] This circumstance can further subject victims of sexual harassment to potential risks, such as reduced settlement offers if a business tries to make up costs for not receiving a deduction.[141] In such cases, employees may be coerced into accepting lower settlement offers in exchange for their employer signing an NDA out of fear that their employer will slander their names in the future or release intimate details of the case that the victims would prefer remain confidential.[142] To address this issue, judicial oversight over such cases should be increased as an added measure of protection for plaintiffs. This would make any scenario in which an employer may attempt to punish victims of sexual harassment by offering lower

138. *See The "Weinstein Tax" and the Unintended Consequences of Congress' Response to the #MeToo Movement*, GORDON & REES SCULLY MANSUKHANI (Feb. 2018), https://www.grsm.com/publications/2018/the-weinstein-tax-and-the-unintended-conseq uences-of-congress-response-to-the-metoo-movement [http://web.archive.org/web/20210 201022850/https://www.grsm.com/publications/2018/the-weinstein-tax-and-the-unintend ed-consequences-of-congress-response-to-the-metoo-movement]. If businesses are not incentivized to cease pursuance of settlements that would be governed under section 162(q), the section would not be as helpful in increasing awareness of sexual harassment, as the lawsuits would continue to settle with confidentiality agreements. *See id.*

139. *See supra* Part IV.D.

140. *Id*. Businesses may offer lower settlement agreements in exchange for signing an NDA to offset the increased economic burden of not receiving a tax deduction following the settlement.

141. *Id*.

142. *See* Keplinger et al., *supra* note 114.

settlement amounts less likely to occur, and it would ensure that the victims do not experience any further harm by also being stripped of their right to confidentiality in an attempt to receive a fair settlement. To compensate plaintiffs, judges should exercise increased judicial oversight of settlement agreements involving sexual harassment by particularly focusing on the plaintiffs' desires and the impact of such settlements specifically on plaintiffs.

G. Additional Employee Protections

One way to combat the vagueness of section 162(q), as well as provide additional mechanisms for discouraging sexual misconduct, is for businesses to take preventative measures to avoid workplace harassment. In order to prevent sexual harassment, some corporations have enacted internal protocols to educate their employees on acceptable versus unacceptable workplace conduct and the repercussions or consequences for employee misconduct.[143] There are no current federal laws that require employers to incorporate sexual harassment policies or training programs into the workplace.[144] However, this would be a beneficial step in taking a proactive approach to address workplace sexual harassment. While such policies alone will not prevent all cases of sexual harassment, they are beneficial in that they provide additional consequences for individuals who conduct themselves inappropriately and clearly highlight a business' stance against workplace sexual misconduct.[145]

While some businesses have taken steps to enact their own protocols to avoid workplace sexual harassment, states may also further enact legislation requiring employers to provide sexual harassment programs despite there being no current federal requirement of such programs.[146] Some states have also enacted sex protection legislation, which incorporates "sex" as a protected class in their discrimination laws.[147] States can also incorporate separate provisions in their discrimination laws that explicitly prohibit sexual harassment or abuse in workplace settings.[148] State legislation can, therefore, be used as an additional tool to enact preventative measures against sexual harassment as well as provide

143. *See* Murad, *supra* note 51.
144. *Id.*
145. *See* Kristen N. Coletta, Comment, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies Are Not Enough and How to Fix It*, 48 SETON HALL L. REV. 449, 473 (2018).
146. *See* Murad, *supra* note 51.
147. *Id*.
148. *Id*.

greater repercussions for accused harassers. Each of these examples could be used as a deterrence mechanism in addition to section 162(q).

V. CONCLUSION

The enactment of section 162(q) of the 2017 tax reform is recent enough that the effects may not be fully recognized at this time. The section has certainly increased public awareness of workplace sexual harassment as highlighted by section 162(q)'s nickname, the Weinstein Tax.[149] Unfortunately, the initial purpose of the tax reform to protect victims of sexual harassment from having their experiences silenced and preventing businesses from benefiting from settlement of such cases has been limited by the section's vague language and Congress's failure to provide any clarifying guidance as to its application.[150] Section 162(q) also fails to account for certain situations where a confidentiality agreement would be beneficial to a plaintiff, further diminishing a victim's autonomy and control over their experience.[151] Additionally, there continue to be other legal mechanisms available to businesses to avoid regulation under section 162(q).[152]

In order to best address these issues, Congress should amend section 162(q) to explicitly define its essential terms. By eliminating the section's current vagueness, section 162(q) will be better able to address the unequal power dynamic between employers and employees so that it may protect victims of sexual harassment and enforce their right to choose whether or not to enter into a private settlement agreement. Understandably, amending the tax reform is not a simple process. So, in the meantime, it is essential that states take preventative measures against the occurrence of sexual harassment, such as enacting their own legislation requiring businesses to enact preventative workplace sexual harassment policies.

149. *See supra* Part II.B.
150. *See supra* Part II.A–B.
151. *See supra* Part IV.F.
152. *See supra* Part IV.C.