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Fines For Vaccine-Mandate Violation: Tax Deductible?

By Robert W. Wood

Like so much else related to COVID, vaccines have long been politicized, and that doesn't seem likely to change anytime soon. But the debates over vaccine mandates and the fines that go with them have been especially politicized. Think of fines as a kind of stick, if the carrot of virus prevention is not enough. Of course, the legal battles are raging, and the Biden Administration's COVID employee vaccine mandate is still being tested in court.

So far, a U.S. appeals court has affirmed the hold on President Biden's COVID-19 vaccine mandate. But that seems unlikely to be the last chapter. In the meantime, some people are looking ahead to whether they might end up having to pay a fine. President Biden announced that employers of 100 workers or more will be required to have their employees fully vaccinated or submit to weekly COVID testing by Jan 4. Those that don't comply will be subject to a series of fines.

Each employee that violates the mandate will cost the employer $13,653 per violation.

What's more, more significant fines of up to $136,532 apply to "willful violations," according to a White House media briefing. Enforcing the employee COVID vaccine mandate is going to be run by OSHA, the Occupational Safety and Health Administration. If you ask some people, OSHA is not exactly an agency that is known for efficiency, and many OSHA fines evidently leave the agency considerable discretion. These fines to not seem to leave too much wiggle room, as the vaccine fines are much more rigid, and they could be large. How large? That can be debated, but a Cato Institute article speculated that a company could theoretically be liable for fines of up to $1.36 million for a willful, repeated violation, plus $136,532 per day that they failed to correct it (up to a maximum of 30 times the daily violation, or a further $4.10 million). That is some serious money, which makes you wonder about taxes.

If people and companies start paying, are these fines and penalties tax deductible? After all, tax deductions cut the real cost of something. About sixty years ago, JFK wasn't happy with corporate expense accounts and business entertainment in the Mad Men era of the three martini lunch. And JFK said: ''The slogan—'It's deductible'—should pass from our scene.'' He said it in a Special Message to Congress on Taxation on April 20, 1961. But that phrase is still uttered a lot today.

If your combined tax rate is say 50%, a tax deduction cuts the cost of the item in half. No one wants to be fined, but a fine that is tax deductible is a lot less painful than a fine that is not. Here, not only would a tax deduction cut the cost, but it might feel a little like you are giving the government a little of its own medicine.

The tax Code generally says no to tax deductions for fines and penalties paid to a government for the violation of any law.

This may sound straightforward, but the regulations and case law make it less so. In fact, the tax law on deducting fines and penalties has been muddled for years, so Congress at the end of 2017 tried to cut back on which fines and penalties can be deducted. Under the clarified law, it seems likely that these fines cannot be deducted, although people may try. The new law says that you can't deduct any amount paid to the government "in relation to" the violation of any law or the investigation or inquiry by the government into the potential violation of any law.

That's awfully broad, but there are exceptions for amounts that constitute restitution, and for amounts that are paid to come into compliance with any law which was violated or involved in the investigation or inquiry. Historically, plenty of companies have argued that a fine was really not meant to punish, but rather to encourage compliance with the law. If that seems like a slippery slope, it has been. Some fines and penalties are meant to punish.

Others are designed to be remedial, not penal. Even if called a fine or penalty, they may be paid into a fund to be used for remediation. In short, like so much else in the tax law, one cannot go by name alone. In the past, big companies have often managed to deduct fines and penalties, despite what seem to be prohibitions in the tax code. Tax deductible settlements are one reason for the proposed Truth in Settlements Act (S.1109).

If passed, it would require federal agencies to disclose the tax deductibility of settlements. It would also require corporations to disclose deductible settlements.

Most legal settlements in business are tax deductible, part of how the IRS taxes legal settlements and legal fees. Under the old rules, BP probably could have written off a majority of its $20.8 billion out-of-court settlement related to the Gulf Oil spill. The deal designated only about one quarter, $5.5 billion, as a non-tax-deductible Clean Water Act penalty.

One big critic of such deals is U.S. Public Interest Research Group, which often rails against tax deductions claimed by corporate wrongdoers. The organization has a research report here on settlement deductions. But the present tax code allows businesses to deduct damages, even punitive damages. Restitution and other remedial payments are also fully deductible.

A poll released by the U.S. PIRG Education Fund said that most people disapprove of deductible settlements. Explicit provisions about taxes in settlement agreements are becoming more common. The Department of Justice expressly blocked Credit Suisse from deducting its $2.6 billion settlement for helping Americans evade taxes. Ditto for the BNPP terror settlement, which stated that BNPP will not claim a tax deduction.

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