

## Coaches' Pay Likely To Dodge New Tax Unless Congress Acts

By Amy Lee Rosen

*Law360 (January 16, 2019, 8:36 PM EST)* -- Action by Congress would be needed to subject public universities and their top sports coaches to a new excise tax on top earners at nonprofits after recent guidance confirmed the tax may not apply to some of those institutions.

While the Internal Revenue Service in recent interim guidance said public universities with determination letters from the agency recognizing their tax-exempt status are subject to the excise tax, the tax will not apply to a government unit such as a state college or university that does not have such a determination letter.

This means that if a top earner at a public university, like a football or basketball coach, gets paid over \$1 million but the state college does not have a determination letter, then the school will not have to pay the 21 percent excise tax on amounts above \$1 million, according to Alexander Reid, partner at Morgan Lewis & Bockius LLP. Without the letter, the college is not considered a tax-exempt organization.



Alabama head coach Nick Saban's total pay for 2018 has been reported at more than \$8 million. (AP)

"If Congress wanted to muster the sufficient justification to tax the salaries of the executive compensation of coaches and other professionals who work for state colleges and universities, it would need to expressly indicate that," he said.

The Tax Cuts and Jobs Act created Internal Revenue Code 4960, which imposes a 21 percent excise tax on nonprofit executive pay exceeding \$1 million and on excess parachute payments.

"Applicable tax-exempt organizations" are subject to the tax and are defined under Section 4960(c) as any entity that is exempt from taxation under Section 501(a), is a farmers' cooperative under Section 521(b)(1), has income excluded from taxation under Section 115(a) or is a political organization under Section 527(e)(1).

Reid explained that some state colleges and universities are part of the state itself. Given this, for the federal government to tax a state college or public university, Congress has to expressly indicate its intent to do so and include a good justification for that tax. Otherwise, the federal government would violate the doctrine of implied intergovernmental tax immunity, he said. That principle prevents the federal government from intruding on individual state governments' sovereignty.

With Section 4960, Congress did not specifically carve out state colleges and universities for taxation under the excise tax. Lawmakers simply used another code section that relates to the income tax exemption of certain government revenue, Reid said. This is why the interim guidance from this month explicitly allows for certain public universities to be exempt from Section 4960, he added.

Reid said the government could not impose the tax on certain universities that, while tax-exempt, do not fall under any of the four categories listed under Section 4960(c), so it would be necessary to change the code to specify that those public universities and colleges can be taxed. He suggested following something like the tax on unrelated business income tax, which under Section 511 explicitly includes state colleges and universities in the mix.

Elliot Dinkin, president and CEO of Cowden Associates Inc., told Law360 he was surprised that some public universities would not be on the hook for the excise tax, but said one solution for taxing college coaches' salaries would be through technical corrections.

"The notice cannot alter the law as written ... and appears to lay out how this can be perfected through a process," he said. "If Congress wants to change this outcome, it would have to be, I think, through technical corrections."

Dinkin explained one way to reduce exposure to the excise tax, if it did apply to a university with a determination letter, could be if the nonprofit also ran a foundation and would pay a coach, like Alabama head coach Nick Saban, to reach out to alumni to help with fundraising for the school. Then the nonprofit alumni foundation, and not the school directly, could pay Saban a portion of money so his salary would not exceed \$1 million.

USA Today has reported that Saban's total pay for 2018 was \$8.3 million, which includes an \$800,000 contract extension or champion signing incentive but does not include the value of housing he is receiving after the Crimson Tide Foundation purchased his home in 2013.

However, the interim guidance closes that potential loophole because it says each tax-exempt entity and related organization must report excise tax liability to the IRS. The guidance defined related organizations under Section 4960 liability to include entities that control or are controlled by the tax-exempt entity, are controlled by one or more people that control the tax-exempt entity, or are one of two types of "supporting organizations," the government said.

"I think the regulations get to that piece of it," Dinkin said. "And [the government] said that [method] won't work as a way to get out of that."

Kurt L.P. Lawson, a partner at Hogan Lovells, told Law360 it was recognized early on that Section 4960 missed one of its main targets, which was highly paid football coaches. However, he said a recently released Bluebook by the Joint Committee on Taxation defined an "applicable tax-exempt organization" and had an important footnote about corrections.

“The recently released Bluebook asserts that Section 4960 applies to state colleges and universities, but acknowledges that “[a] technical correction may be necessary to reflect this intent,” Lawson told Law360.

Lawson said while many recognized early on that Section 4960 will not apply to many schools, over the years many entities have applied for and received determination letters but are exempt from tax under Section 501(c)(3).

"They have done this for a number of reasons, including to facilitate fundraising and to permit governmental entities that are not educational organizations, e.g., state hospitals, to maintain Section 403(b) annuity plans," he said. "The notice requires these entities to give up their 501(c)(3) letters, potentially giving them some headaches."

Sarah K. Ivy, a partner at FisherBroyles LLP, agreed that not every public university or college is automatically exempt from the excise tax, and more nonprofit executive pay information will be available when Form 990s become available in 2018.

A governmental entity that is not recognized as exempt under Section 501(a) and does not exclude income from gross income under Section 115(1) is not an “applicable organization” under Section 4960, Ivy said. Therefore, it is not subject to the tax, but there still could be liability if it is a related organization under Section 4960(c)(4)(B), she said.

“Based upon my research, it appears that a number of public universities/colleges are exempt from income tax under code Section 501(c)(3) and are likely subject to the excise tax. For example, University of Miami is a tax-exempt entity and filed a Form 990 in 2017,” she said. “As a result, the University of Miami should be subject to the excise tax.”

The University of Miami filed Form 990s in 2017 and in 2016, but neither IRS document listed its covered employees, so it is unknown how much the school’s former head football coach, Mark Richt, was paid. However, USA Today reported he received over \$4 million in 2018.

Ivy explained the covered employee information will be on the new Line 15 of Part V of Form 990, which has been released and asks if excess remuneration or excess parachute payments were made during that tax year. If the entity responds yes, then the organization must complete Form 4720, Schedule N, which will show covered employees, excess remuneration and parachute payments.

“The Univ[ersity] of Miami [Form] 990 is for 2017, which doesn’t include any questions regarding the excise tax,” she said. “We would have to review the 2018 Form 990.”

--Editing by Tim Ruel and John Oudens.

*Correction: An earlier version of this article misspelled Saban's name in one instance. The error has been corrected.*