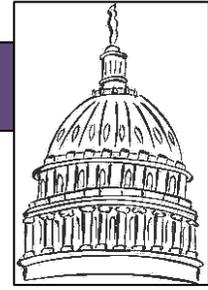




Health Care Reform Update



IMPORTANT NOTICE REGARDING HEALTHCARE REFORM Update 75

November, 2017

IRS Updates Guidance on Assessing 2015 Employer Shared Responsibility Penalties

Outgoing IRS commissioner John Koskinen, appears to have decided this year, the IRS will strictly enforce the Affordable Care Act (ACA) Employer Shared Responsibility Mandate for the first time since the laws inception. The IRS confirmed that they will start enforcing penalties to companies with 50 employees or more that fail to meet the requirements of the Employer Shared Responsibility provisions contained within the ACA, which means companies could be on the hook for penalties going back to 2015. The IRS was supposed to begin enforcing the mandate in 2014, but instead issued Q&A guidance on employer shared responsibility to detail the procedure it will use to assess Code § 4980H liability for the 2015 calendar year.

As background, an applicable large employer (ALE), i.e., an employer that employed an average of 50 or more full-time employees (or equivalents) in the preceding year became subject to a potential monthly penalty starting in 2015 for failure to offer adequate health coverage to its full-time employees and dependents if any full-time employee received a premium tax credit for coverage purchased through an Exchange. As required by Code § 6056, ALEs filed information returns (Forms 1094-C and 1095-C) with the IRS in 2016 to report the information necessary for the IRS to administer the Code § 4980H provisions, including calculation of 2015 employer penalties.

Here are highlights:

Informing an ALE of Potential Liability:

Q/A-55 states that the IRS will issue Letter 226J to notify an ALE of a proposed penalty amount. This preliminary letter will include:

- A brief explanation of Code § 4980H, a payment summary table itemizing the proposed penalty by month under either Code § 4980H(a) or Code § 4980H(b)
- A listing on Form 14765 of the ALE's employees who were allowed a premium tax credit (with additional information about the employees gleaned from the ALE's information returns)
- The name and contact information of a specific IRS employee to contact with any questions.

More information, and a sample Letter 226J, can be found on the [IRS's Understanding your Letter 226-J webpage](#). A response form (Form 14764), generally due within 30 days, will also be included so that an ALE can inform the IRS whether it agrees with the proposed penalty. The 2015 annual adjusted penalty amounts were announced in [IRS Notice 2015-87](#) (\$2,080 under Code § 4980H(a) and \$3,120 under Code § 4980H(b)).

ALE's Response to Proposed Penalty Determination:

Q/A-56 notes that Letter 226J will provide instructions for how an ALE should respond in writing with respect to a proposed penalty. The IRS will acknowledge an ALE's response to Letter 226J with an appropriate version of Letter 227, which is a series of five different letters that, in general, acknowledge the ALE's response and describes further actions the ALE may need to take. If, after receipt of Letter 227, an ALE disagrees with the IRS's proposed or revised penalty, the ALE may request a pre-assessment conference with the IRS Office of Appeals. Significantly, if an ALE does not respond to either Letter 226J or Letter 227, the IRS will assess the proposed penalty and issue a notice and demand for payment.



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Making a Penalty Payment:

Q/A-57 indicates that if, after correspondence between the ALE and the IRS (or a conference with the IRS Office of Appeals), an ALE is determined to be liable for a penalty, the IRS will assess the penalty and issue a notice and demand for payment (Notice CP 220J). This payment demand will include a summary of the penalty and the balance due, along with instructions on how to make payment. ALEs will not be required to include the payment on any tax return that they file or to make any payment before a notice and demand for payment is made.

When Will IRS Notifications Begin?

Q/A-58 states that the IRS plans to issue Letter 226J in "late 2017" to inform ALEs of their potential liability for the 2015 calendar year. Various forms of transition relief applied for purposes of Code § 4980H for the 2015 plan year an ALE's use of any particular form of transition relief would have been indicated in its Forms 1094-C and 1095-C filing for the 2015 tax year.

Final Thoughts:

Despite the complexity and struggles in implementing employer shared responsibility, the IRS now seems poised to begin assessments of the first-ever penalties. Based on the updated Q&A guidance, the preliminary letters advising ALEs of potential liability will be issued very soon. Employers should be on the lookout for such correspondence and be prepared to promptly review the letters, make note of any deadline for responding, and have the appropriate documentation on hand to challenge any assessment that appears erroneous.

Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act
Available at:

<https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act>

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