

ACA Employer Mandate Assessments Coming

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Within the past few weeks, IRS officials have informally indicated that the IRS would begin assessing tax penalties under the Affordable Care Act's (ACA) employer shared responsibility. The IRS has now updated its [Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act](#) (see Q&As 55-58) and has issued a form preliminary tax notification letter ([Letter 226j](#)). The first round of letters is expected before the end of the year and will relate to the 2015 tax year. Background information and steps employers should take if they receive Letter 226j are provided below.

Background

A key component of the ACA is the employer shared responsibility mandate, which requires applicable large employers (generally those with 50 or more full-time employees and equivalents, determined on a controlled group basis) ("ALEs") to offer minimum essential coverage (MEC) to 95% of their full-time employees. This coverage must also be affordable, based on various affordability safe harbors, and have minimum value. For plan years beginning in 2015, ALEs with 50-99 full-time employees were exempt from the requirement to offer MEC to 95% of their full-time employees, but the MEC offered to full-time employees still had to be affordable and have minimum value. ALEs with 100 or more full-time employees would be deemed to satisfy the employer shared responsibility mandate in 2015 if MEC was offered to 70% of their full-time employees, and that coverage was affordable and had minimum value. All ALEs became subject to the full 95% threshold in plan years beginning in 2016.

Over the past few years, ALEs and other coverage providers have been required to submit information reporting forms to give the IRS the information necessary to determine compliance with the individual and employer shared responsibility mandates. ALEs generally file Forms 1094-C and 1095-C containing information regarding offers of MEC, including whether that MEC was affordable and had minimum value.

Penalties for failure to satisfy the employer shared responsibility mandate can be severe. Under Internal Revenue Code Section 4980H(a), an ALE that fails to offer coverage to 95% of its full-time employees could be assessed a penalty equal to \$166.67 (for 2014 and later indexed for inflation, as described below) per full-time employee (less 30 full-time employees) per month if any full-time employee obtains coverage on the Marketplace and receives a premium credit. Under Internal Revenue Code (“Code”) Section 4980H(b), an ALE that fails to offer affordable coverage or coverage that has minimum value to any full-time employee could be assessed a penalty equal to \$250 (for 2014 and later indexed for inflation, as described below) per month for any full-time employee that obtains coverage on the Marketplace and receives a premium credit. The penalty amounts under the employer shared responsibility mandates are indexed for inflation:

Year	4980H(a)	4980H(b)
2014 (non-enforcement year)	\$166.67/month	\$250/month
2015 (transition relief)	\$173.33/month	\$260/month
2016	\$180/month	\$270/month
2017	\$188.33/month	\$280/month
2018	\$193.33/month	\$290/month

Preliminary Penalty Notice

Based on statements from the IRS, notices of preliminary penalty determinations will be sent before the end of 2017. ALEs who could be assessed a penalty will receive a Letter 226J which will include general information regarding the employer shared responsibility mandate and assessable penalties, a tabular summary of the penalties being assessed (shown on a monthly basis), an employee list showing each full-time employee triggering a penalty and the Form 1095-C indicator codes attributable to that employee, an employer response form (Form 14764, which as of the date of this blog entry, has not been released), and a description of steps to take if the employer disagrees with the IRS.

An employer will respond using Form 14764 to either agree or disagree with the proposed penalty amount. If an employer indicates its disagreement, the IRS will respond with a Letter 227 (not yet released) describing further actions the employer must take. The Letter 227 will likely explain that an employer must follow the steps set forth in [Publication 5](#) and may request a pre-assessment conference within 30 days of the employer's receipt of the Letter 227. If an employer fails to respond to either Letter 226J or Letter 227, the IRS will formally assess the penalty and issue a notice of demand for payment (Notice CP 220J).

Employer Steps if Penalty Notice Received

Given the severity of penalties that could be assessed under the employer shared responsibility mandate, employers take action immediately upon receiving a Letter 226J. Below are recommended steps to take upon being assessed a penalty:

1. Utilize counsel experienced with the ACA's employer shared responsibility mandate.
2. Compile the Form 1095-Cs for each assessable full-time employee listed by the IRS in Letter 226J.
3. Closely compare the information contained in Letter 226J with the Form 1095-Cs for each assessable full-time employee.
4. Review other relevant payroll and benefit enrollment as necessary to determine whether each assessable full-time employee listed by the IRS was, in fact, full-time and did not actually receive an offer or MEC or the MEC offered was not affordable or did not have minimum value.
5. Work with counsel to determine how to respond to the IRS. If the employer disagrees with the assessment, Form 14764 should be submitted explaining the disagreement. Once Letter 227 is received by the employer, a pre-assessment conference should be scheduled to formally appeal the potential assessment.
6. Prepare all relevant materials and supporting documentation in advance of the pre-assessment conference.
7. Attend the pre-assessment conference with counsel and await the IRS's determination.

Because transition relief during the 2015 plan year exempted employers with less than 100 full-time employees from the penalty in Code Section 4980H(a) and reduced the penalty threshold to 70% for larger employers, we anticipate that assessments this year will primarily be based on the smaller, individualized penalty set forth in Code Section 4980(b).

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