

November 2017

IRS To Begin Assessing Employer Mandate Penalties

On November 2, 2017, the IRS updated the [Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act](#) (“ACA”) to include information about the assessment of employer mandate penalties (Questions 55-58) for the 2015 calendar year. The IRS plans to issue **Letter 226J** in late 2017 informing Applicable Large Employers (“ALEs”)¹ of potential liability under the ACA employer shared responsibility payment provisions (employer mandate) for the 2015 calendar year, if the IRS determines that:

- At least one month in the year, one or more full-time employees was enrolled in a Marketplace qualified health plan and,
- A full-time employee received a premium tax credit (subsidy) to help pay for the Marketplace coverage as the ALE did not qualify for an affordability safe harbor or other relief for the employee.

The IRS notes that determination of an employer mandate penalty is based on information reported on the IRS Forms 1094-C and 1095-C. **Employers with concerns or challenges to the application of a potential employer mandate penalty for calendar 2015 should be prepared to quickly respond within 30 days from the date of the Letter 226J.**

Letter 22J will include the following information as well as the name and contact information of a specific IRS employee an employer may contact with any questions about the Letter:

- A brief explanation of section 4980H, the employer shared responsibility payment provisions (employer mandate). **4980H(a)**: failure to offer Minimum Essential Coverage to 70% (transition relief for 2015) of full-time employees (and dependents), and at least one full-time employee receives a premium subsidy for Marketplace coverage, **4980H(b)**: offer coverage to at least 70% of full-time employees (and dependents), but at least one full-time employee receives a premium subsidy for Marketplace coverage, because the offer of coverage was either unaffordable or did not provide minimum value, or no coverage was offered to this employee.
- *Payment summary table* itemizing the proposed payment by month and indicating for each month if the liability is under section 4980H(a) or section 4980H(b) or neither,
- An explanation of the employer shared responsibility payment summary table,
- An employer response form, **Form 14764**, “*ESRP Response*”,
- **Form 14765**, “*Employee Premium Tax Credit (PTC) List*” which identifies, by month, the (a) assessable full-time employees who for at least one month in 2015 were full-time employees allowed a Marketplace premium subsidy, and (b) the employer did not qualify for an affordability safe harbor or other relief as reported on lines 14 and 16 of the full-time employee’s Form 1095-C,
- A description of the actions the ALE should take if it agrees or disagrees with the proposed employer shared responsibility payment in Letter 226J, and
- A description of the actions the IRS will take if the ALE does not respond timely to Letter 226J.

Before the IRS will issue a notice and demand for payment, employers will have an opportunity to respond in writing within 30 days to Letter 226J, to either agree or dispute all or part of the penalty determination. The IRS will acknowledge the employer’s challenge by issuing **Letter 227** which may describe further actions an employer may need to take. If an employer continues to disagree with the IRS penalty determination, the employer may request a pre-assessment conference with the IRS Office of Appeals. Letter 227 and [Publication 5 Your Appeal Rights and How to Prepare a Protest If You Don’t Agree](#) will provide information and instructions on how to request a conference. A conference should be requested in writing, within 30 days from the date of Letter 227.

The IRS will assess the proposed penalty amount and issue a notice of demand for payment on **Notice CP220J** if an employer does not respond within the time limits to either Letter 226J or Letter 227. As of this writing the letters and forms are not yet available.

¹An Applicable Large Employer for a calendar year must have employed an average of at least 50 full-time employees (including full-time equivalent employees) during the preceding calendar year. Two or more businesses that have a certain level of common or related ownership generally are treated as a single employer, and are combined for purposes of determining whether or not they collectively employ at least 50 full-time employees (including full-time equivalent employees).

ADDITIONAL INFORMATION

Information contained in this Client Alert is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance with respect to matters of law, tax and related regulation. Cherry Bekaert Benefits Consulting, LLC provides comprehensive consulting and administrative services with respect to all forms of employee benefits, risk management, qualified and non-qualified retirement plans, private client services, transaction services, and compensation and human resources.

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