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The IRS Continues to Send Letters Claiming Penalties for ACA §4980H Employer Shared Responsibility (Employer Mandate) Violations

What Employers Need to Know

The IRS continues to send out 226J letters attempting to collect penalties from employers who it thinks did not meet the ACA §4980H employer mandate requirements for 2015.

BACKGROUND

The Affordable Care Act (ACA) contains requirements called the employer shared responsibility rules (often called the employer mandate). Code §4980H requires applicable large employers (ALEs – those with 50 or more full-time equivalents) to offer coverage to full-time employees and their dependent children. Employers who fail to do so face two different potential penalties. The IRS has begun to send letters to employers (Letter 226J) to begin the collection process for employers who have failed to meet the §4980H requirements for benefits offered during 2015. Penalty calculations are based on data provided by employers to the IRS on Forms 1094 and 1095. There are two different penalties that could apply to an ALE, but only one would apply for any particular tax year.

We believe that many of the 226J proposed employer assessments will be applied due to mistakes made in employer reporting, rather than to an actual violation of a §4980H requirement.

§4980H(a) – Offer Coverage to “Substantially All” Full-Time Employees

The so called “(a) penalty” is based on whether the employer made an offer of coverage to enough of their

full-time employees. For 2015, an employer who fails to offer minimum essential coverage (MEC) to 70% of all full-time employees (and their dependent children) faces a potential penalty of \$173.33/month multiplied by the total number of full-time employees (not counting the first 80). Example of a §4980H(a) penalty:

- An employer with 200 full-time (FT) employees fails to offer coverage to 70% of the FT employees for 9 months of 2015.
 - » 2015 penalty = \$187,196.40
 - » \$173.33 times 120 (FT employees not counting first 80) = \$20,799.60 per month times 9 months = \$187,196.40

§4980H(b) – Failure to Offer Affordable Minimum Value Coverage

The “(b) penalty” applies if an employer fails to make an affordable offer of minimum value coverage to a full-time employee, and that employee enrolls in individual coverage through a public Exchange/Marketplace and qualifies for the premium tax credit (PTC). For 2015, the (b) penalty is \$260/month for each full-time employee who receives a PTC. Example of a §4980H(b) penalty:

- 2 full-time employees are not offered affordable coverage. One receives a PTC for 6 months, the other for 12 months.
 - » 2015 penalty = \$4,680
 - » Employee 1: \$260 times 6 months = \$1560;
 - » Employee 2: \$260 times 12 months = \$3120



RECEIVING LETTER 226J

- Alert your mail room to be on the lookout for anything coming from the Department of the Treasury, Internal Revenue Service. With only 30 days to respond or request an extension, you will want the letter forwarded to you immediately.
- Since each employer in an aggregated group was required to file its own 1094 and 1095s with the IRS, ALEs who want to coordinate their response to the IRS should alert all ALE members to be on the lookout for Letter 226J

WHAT AN EMPLOYER SHOULD DO UPON RECEIVING A LETTER 226J

Most importantly, the employer must act quickly. An employer has only 30 days to respond to the IRS. The IRS will initiate a collection process if an employer fails to respond on a timely basis.

- Call the IRS number included on the Form 14764 and request a 30-day extension to respond.
- Contact the entity (accounting firm or law firm) that you use to communicate directly with the IRS for tax-related issues.
- Contact your benefits advisor or firm you used for ACA reporting to help collect data necessary to respond to the IRS.
- See the enclosed flow chart and Q&A for more details on responding to the IRS.

As always, should you have any questions, please contact your Parker, Smith & Feek Benefits Team. While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it.

WE CAN HELP

We have access to a team of §4980H and ACA reporting experts ready to help employers understand the Letter 226J and help in developing the employer's response to the IRS. Fees are based on the complexity of the project and how much time the employer has to respond.

For more information contact your [Benefits Team at Parker, Smith & Feek](#) or go to 226jsupport.com



Questions & Answers

QUESTION 1: What is the IRS process for assessing penalties under the Affordable Care Act?

ANSWER 1: The IRS has been busy reviewing ACA employer reporting forms filed for plan years that began in 2015. Based on this review, they started sending "Letters 226J" in early November. These letters will go to the individual listed as the contact person on line 7 of Form 1094-C. Some employers will have filed more than one Form 1094-C and will have different contact people listed.

QUESTION 2: How do I know if I received a letter from the IRS telling me I owe a penalty under ACA?

ANSWER 2: Your letter will begin by saying that the IRS has "made a preliminary calculation of the Employer Shared Responsibility payment (ESRP) that you owe." The letter will probably have a label on the bottom right corner that says "Letter 226J." It will also include an ESRP Summary Table and Explanation; Form 14764 ("ESRP Response"); and Form 14765 ("Employee Premium Tax Credit (PTC) Listing").

QUESTION 3: What is the first thing I should do if I disagree with the IRS letter?

ANSWER 3: The first thing to do is look at the dates in the upper right corner on the first page of the IRS Letter. The "Response Date" is very important. Failure to respond by this date may result in a demand for payment from the IRS and could make it more difficult to challenge the IRS.

QUESTION 4: What are the next things I should do if I plan to pay the penalty?

ANSWER 4: Just follow the instructions in Letter 226J and include your payment with Form 14764 (You should receive a copy of Form 14764 in your initial letter from the IRS).

QUESTION 5: What are the next things I should do if I plan to dispute the penalty?

ANSWER 5: Consider whether you will engage someone to assist you in dealing directly with the IRS. Who does your organization typically use to respond to IRS tax-related issues? Likely candidates include

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a lawyer or accountant who can represent you before the IRS. We are prepared to provide assistance regarding benefit plan information to compile the necessary material for you, or your lawyer or accountant, to respond to the IRS.

- Your first step should be to call the IRS number located on the top of the Form 14764 (included with the Letter 226J) and request additional time to respond.
- Complete and sign Form 14764 and assemble all supporting materials. Your reply must include a signed statement indicating why you object to the penalty, changes you want to make to your reporting forms, and changes to preprinted forms you received along with the IRS Letter 226J.
- Form 14765, Employee PTC Listing – Make changes, if any, on the Employee PTC Listing. Include your revised Employee PTC Listing, if necessary, and any additional documentation supporting your changes with your Form 14764, ESRP Response, and signed statement.
- Get moving. We cannot stress enough that a proper response may require significant effort to prepare. So far, the IRS has not indicated whether they will accommodate requests for additional time to reply. Our advice is to move quickly.
- Make sure the IRS receives your completed package BY THE RESPONSE DATE INDICATED ON YOUR INITIAL LETTER FROM THE IRS or any extension granted in response to your request for more time.

QUESTION 6: What happens after the IRS receives my timely objections?

ANSWER 6: The IRS will respond with a "Letter 227." Your Letter 227 will describe further actions you must take. Watch for your Letter 227 and continue to pay close attention to any Response Date. If the IRS is planning to continue the dispute, you will have an opportunity to schedule a pre-assessment conference with the IRS Office of Appeals.

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