

Three Things about the Affordable Care Act Employers Need to Focus on Now

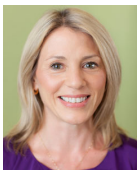
The Affordable Care Act ("ACA") is alive and well, despite renewed [legal challenges](#) and the elimination of the "individual mandate" beginning next year. While the [Tax Cuts and Jobs Act](#) reduced the tax penalty for individuals who don't have health coverage to \$0, effective for 2019, employers continue to be subject to penalties for failing to comply with certain ACA rules. Earlier this year, the IRS began enforcing penalties against employers who fail to meet the "employer shared responsibility" requirements of the ACA. Here are three things about the ACA that employers need to focus on now to avoid significant financial liabilities.

1. The IRS Is Currently Assessing Employer Penalties Using "[226-J](#)" Letters

In 2017, the IRS began assessing "employer shared responsibility payments" ("ESRP") or tax penalties, against large employers who don't offer qualifying health coverage to at least 95% of their full-time employees. The initial assessment comes in the form of a "226-J" letter, which explains that the employer may be liable for an ESRP, based on information obtained by the IRS from Forms 1095-C filed by the employer and tax returns filed by the employer's employees. The employer will have only 30 days to respond using the provided IRS [Form 14764](#), and must complete and return IRS [Form 14765](#) to challenge any part of the assessment.

We recommend that employers share this Alert and a copy of the IRS 226-J form letter that is included as a link in this Alert with staff who are likely to be the first to receive communications from the IRS. Time to reply is short and you need to be notified immediately if you receive an IRS 226-J form letter. You may want to consider contacting your legal counsel as soon as the first IRS notice is received.

Depending on the employer's response to the initial assessment, the IRS will send the employer one of four types of "[227](#)" [acknowledgment letters](#). If the employer disputes the penalty assessment, the IRS could accept the additional information provided by the employer and reduce the penalty to \$0 (a [227-K letter](#)). However, if the IRS rejects any part of the employer's response, the employer will receive either a [227-L letter](#), with a



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reduced penalty amount, or a [227-M letter](#), to notify the employer that the amount of the initial assessment hasn't changed. Either letter will explain [steps](#) the employer must take to continue disputing the assessment, including applicable deadlines. These steps include requesting a telephone conference or meeting with an IRS supervisor, or requesting a hearing with the IRS Office of Appeals.

2. ACA Reporting Requirements Still Apply

The IRS uses Forms [1095-C](#) to determine whether to assess ESRP penalties on the employer. Large employers must file Forms 1095-C with the IRS and send them to full-time employees each year to document their compliance with the ACA requirement to offer qualified, affordable coverage to at least 95% of full-time employees and their dependent children. Generally, the forms are due to employees by January 31, and to the IRS by March 31, each year, to report compliance for the prior year. In years past, the IRS has [extended the deadline](#) for providing the forms to employees, but not the deadline for filing with the IRS.

We understand that a number of the ACA employer penalties being assessed now are based on reporting errors. We recommend that you continue to carefully monitor your ACA filings and reports to avoid complex responses and tight deadlines based on erroneous reporting. You should contact legal counsel if you have reporting questions.

Penalties of up to \$520 per form can apply if an employer both fails to file with the IRS and to send the forms to employees, and can be doubled if the IRS determines that the employer intentionally disregarded the filing requirement. These penalties can apply if an employer fails to file, files late, or if the forms are timely filed, but are incorrect or incomplete. In addition to the reporting-related penalties, inaccurate information on Forms 1095-C can lead to erroneous ESRP assessments that the employer will then need to refute, using the IRS forms and procedures described above. Employers should continue tracking offers of coverage made for each month of 2018, to prepare for compliance with the Form 1095-C reporting requirement early next year.

3. The “Cadillac Tax” Is Still Looming

The ACA includes a provision to impose an annual excise tax on high-cost health coverage, the so-called “Cadillac tax”, that was initially scheduled to apply beginning this year. Implementation of the Cadillac tax has been repeatedly delayed, and the [federal budget bill](#) passed in January delayed it again through December 31, 2021. Despite the repeated delays, the Cadillac tax has not been repealed and is currently scheduled to apply to health coverage offered on or after January 1, 2022.

We recommend that employers who are negotiating collective bargaining agreements this year that include terms for health benefits extending beyond 2021 consider the potential effect of the Cadillac tax on the cost of health benefits in the event the tax takes effect as currently scheduled.

STAY ALERT: While uncertainty continues to surround the ACA, we recommend that employers remain aware of continuing compliance requirements to avoid the potentially significant penalties that remain in effect under the ACA. We will continue to follow developments in this area and provide updates on new developments as they occur. Please contact us if you have questions or concerns.

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