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Recently, the Internal Revenue Service (“IRS”) issued additional FAQs regarding the Employer Shared Responsibility Payment (an assessment under the employer mandate).

Briefly, the FAQs:

- Describe a new Letter 226J that will be issued to Applicable Large Employers (“ALEs”) if the IRS determined at least one full-time employee (“FTE”) was enrolled in a qualified health plan for which a premium tax credit was allowed and the ALE did not offer the FTE affordable, minimum value coverage.
- Provide an opportunity and process for an ALE to follow and respond to Letter 226J before any penalty assessed and notice and demand for payment is made.
- Establish a specific notification timeframe (generally 30 days from the date of the letter) that an ALE will have to respond to the IRS regarding the proposed assessment. Failure to respond timely may result in the IRS assessing the penalty and issuing a notice and demand for payment with no further opportunity for the ALE to respond.

- Describe Notice CP 220J which will be used as formal notice and demand for payment of a penalty.
- Suggest that, for calendar year 2015, the first Letters 226J will be issued to ALEs in late 2017.

This update to the existing FAQs on the employer-shared responsibility requirement offers the first real guidance on the process of notification and assessment of any employer mandate penalties.

The IRS appears ready to move forward with this notification and assessment process given the failure of ACA repeal and absent other rulemaking, guidance, or legislation that further delays enforcement of the mandate.

Recently, however, new legislation has been introduced in the House and Senate that would suspend the employer mandate for the period before January 1, 2018. Whether Republican leadership can secure enough votes to pass another attempt at a party-line repeal remains uncertain.

The following provides additional details, including an explanation of the various letters and notices that an ALE may receive as part of this process. Copies or samples of these letters are not currently available on the IRS website.

## Background

Beginning in 2015, ALEs may be subject to an assessable payment (referred to as a “penalty”) if any FTE receives a premium tax-credit (a “subsidy”) to purchase health insurance through the Marketplace. There are two possible penalties (“A” and “B”). The penalty that may apply will depend on the circumstances of the ALE.

While ALEs are generally defined as employers with at least 50 FTEs (including full-time equivalent employees and employees under common ownership) in the preceding calendar year, for 2015 only (and plan years that begin 2015) the IRS provided helpful relief generally excluding ALEs with 50-99 FTEs from penalty assessments, subject to specific rules.

## The 2015 Penalties

- **“A” Penalty – “No Coverage” Penalty.**

This penalty applies when an ALE does not offer at least 70% of FTEs and their dependent children minimum essential coverage and at least one FTE receives a subsidy in the Marketplace to purchase qualified health plan coverage.

- The penalty is \$173.33/month (or \$2,080/year) multiplied by the total number of FTEs – 80.

- **“B” Penalty – “Offer Coverage Penalty”:**

This penalty applies when an ALE offers at least 70% of FTEs and their dependent children minimum essential coverage but the coverage is not affordable, does not provide minimum value or excludes 30% or fewer FTEs and one (or more) of those FTEs receive a subsidy in the Marketplace.

- The penalty is the lesser of:
  - \$260/month (or \$3,120/year) multiplied by the total number of FTEs who receive a subsidy; or
  - The “A” penalty.

**The above rules are somewhat different for years after 2015 and are not addressed in this summary.**

## **MAKING A SHARED RESPONSIBILITY PAYMENT (FAQS 55 – 58)**



**Q How does an employer know that it owes an employer shared responsibility payment?**

**A** The IRS will use Letter 226J to describe the general procedures it will use to propose and assess an employer penalty. Letter 226J will be issued to an ALE if the IRS determines that, for at least one month in the year, one or more of the ALE's FTEs was enrolled in a qualified health plan (i.e. individual Marketplace plan) for which a premium tax credit was allowed (and the ALE did not qualify for an affordability safe harbor or other relief for the employee).

Letter 226J will include:

- a brief explanation of the employer mandate (Code Section 4980(H));
- an employer shared responsibility payment summary table itemizing the proposed payment by month and indicating for each month if the liability is an "A" penalty or a "B" penalty, or neither;
- an explanation of the employer shared responsibility payment summary table;
- an employer shared responsibility response form, Form 14764, "ESRP Response";
- an employee PTC list, Form 14765, "Employee Premium Tax Credit (PTC) List" which lists, by month, the ALE's assessable FTEs, and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable FTE'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.

Employers that receive a Letter 226J must respond by the date shown on the letter (usually within 30 days from the date of the letter). The Letter 226J will include contact information of a specific IRS employee that the ALE may contact with questions.

**Q Does an employer that receives a Letter 226J proposing an employer shared responsibility payment have an opportunity to respond to the IRS about the proposed payment, including requesting a pre-assessment conference with the IRS Office of Appeals?**

**A** Yes.

ALEs will have an opportunity to respond to Letter 226J before any penalty is assessed and notice and demand for payment is made. Letter 226J contains instructions for how the ALE should respond in writing, either agreeing with the proposed employer shared responsibility payment or disagreeing with part (or all) of the proposed amount.

- The IRS will acknowledge the ALE's response to Letter 226J with an appropriate version of Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226J and describe further actions the ALE may need to take).
- If, after receipt of Letter 227, the ALE disagrees with the proposed or revised employer shared responsibility payment, the ALE may request a pre-assessment conference with the IRS Office of Appeals. The ALE should follow the instructions provided in Letter 227 and Publication 5, Your Appeal Rights and How To Prepare a Protest if You Don't Agree for requesting a conference. A conference should be requested in writing by the response date shown on Letter 227 (generally will be 30 days from the date of Letter 227).

**If the ALE fails to respond to either Letter 226J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility payment and issue a notice and demand for payment, regardless of actual liability.**

**Q How does an employer make an employer shared responsibility payment?**

**A** If, after correspondence between the ALE and the IRS or a conference with the IRS Office of Appeals, the IRS or IRS Office of Appeals determines that an ALE is liable for an employer shared responsibility payment, the IRS will assess the employer shared responsibility payment and issue a notice and demand for payment, Notice CP 220J.

Notice CP 220J will include a summary of the employer shared responsibility payment and will reflect payments made, credits applied, and the balance due, if any. That notice will instruct the ALE how to make payment.

ALEs will not be required to include the employer shared responsibility payment on any tax return that they file or to make payment before notice and demand for payment. For payment options, such as entering into an installment agreement, refer to Publication 594, The IRS Collection Process.

**Q When does the IRS plan to begin notifying employers of potential employer shared responsibility payments?**

**A** For the 2015 calendar year, the IRS plans to issue Letter 226J informing ALEs of their potential liability for an employer shared responsibility payment, if any, in late 2017.

The FAQs do not address when notification regarding assessments in calendar year 2016 and 2017 will happen. Further guidance expected.

## Employer Action

ALEs should:

- For now, keep an eye out for the new Letter 226J in the mail. Be mindful of the timeline to respond to the notice.
- Ensure they have records reflecting offers of coverage to identified FTEs for CY 2015. This will include copies of the Forms 1094-C and 1095-C that they filed. These Forms will be helpful when reviewing any IRS notice in determining whether an assessment is correct.
- Contact their tax advisor for assistance if they receive the letter and have questions. Please note that we cannot represent clients in this process.