

## IRS Letter 226J: Employer ACA Penalty Assessments and IRS Enforcement

Over the past year, the Patient Protection and Affordable Care Act (the “ACA”) has been the center of fierce political debate. Caught in the crosshairs has been the fate of the employer shared responsibility provisions, which provide that employers with more than 50 full-time employees (including full-time equivalent employees) may be subject to significant Federal tax penalties for (1) failing to offer minimal essential coverage to substantially all full-time employees and their dependents (the “A Penalty”), or (2) offering coverage that is either “unaffordable” or does not provide “minimum value” (the “B Penalty”) (referred to collectively as the “ACA Penalties”). The ACA Penalties for an employer are triggered by a full-time employee enrolling in the Health Insurance Marketplace (the “Exchange”) and receiving a Premium Tax Credit. Despite numerous attempts by Congress to repeal or change the ACA, the ACA provisions remain the law – and the IRS has made it clear that it will enforce the ACA Penalties.

On January 20, 2017, the White House released Executive Order 13765, directing applicable agencies to exercise their authority and discretion to reduce potential financial burdens imposed by the ACA while Congress works to repeal and replace the ACA. Between May and September 2017, Republicans in Congress released multiple drafts of legislation, each of which sought to repeal the ACA Penalties retroactive to January 1, 2016; however, none had sufficient support to be enacted. Throughout Congress’s deliberations, the Internal Revenue Service (the “IRS”) quietly maintained its commitment to enforcing the ACA Penalties. On April 14, 2017, the IRS Office of Chief Counsel formally announced that Executive Order 13765 did not change the law and that the IRS would enforce the ACA Penalties so as long as the law remains unchanged.

*In the fourth quarter of 2017, the IRS announced that it is moving ahead with ACA Penalty assessments against employers.* The IRS’s assessments of ACA Penalties for the 2015 calendar year are expected to be mailed out in “late 2017.” The IRS determines which employers may be liable for ACA Penalties by reviewing each employer’s Form 1094-C and Form 1095-C filings and then cross checking that employer’s full-time employees with individuals who received a Premium Tax Credit on the Exchange. Employers who may have liability will receive Letter 226J from the IRS, which includes, among other things, an explanation of the penalty that is being assessed and instructions for either paying or appealing the penalty.

The A Penalty is calculated monthly and is equal to the product of (i) the “applicable payment amount” and (ii) the number of full-time employees employed by the ALE in any month, less 30 (some employers are entitled to an 80 employee reduction for the 2015 calendar year). The “applicable payment amount” for the 2015, 2016, and 2017 calendar years is \$173.33, \$180, and \$188.33 with respect to any month, respectively.

The B Penalty is calculated monthly and is equal to the product of the (i) “applicable payment amount” and (ii) the number of full-time employees who receive a Premium Tax Credit in any month. The “applicable payment amount” for the 2015, 2016, and 2017 calendar years is equal to \$260, \$270, and \$282.50 with respect to any month, respectively.

**Upon receiving Letter 226J, an employer must respond to the IRS within 30 days, regardless of whether the employer agrees or disagrees with the assessment.** Employers that agree with the proposed ACA Penalties must return Form 14764 and pay the applicable penalty amount immediately. Employers that choose to contest all or part of the proposed ACA Penalties must return Form 14764 with a statement and any supporting information as to why the penalty should not apply. If an employer does not respond by the deadline in Letter 226J, the IRS will send a “Notice and Demand” for the full amount of the penalty, the amount due will be subject to IRS lien and levy enforcement actions, and interest will accrue from the date of that demand until the full penalty amount is paid to the IRS. Therefore, it is imperative that an employer take immediate action to respond to any Letter 226J that it receives.

The past year has proved to be a volatile one for the ACA and this law still faces challenges; however, as long as the employer shared responsibility provisions remain the law, it is paramount that employers continue to take steps to comply, including the following.

- Track which employees are full-time using either the monthly measurement method or the look-back measurement method. Generally, an employee is full-time if he or she works, or works on average, at least 130 hours a month.
- Keep detailed records of which employees are full-time and that demonstrate which individuals received an offer of coverage.
- Confirm that at least one medical plan option offers “minimum value” and is “affordable” for full-time employees.
- Furnish each individual who was a full-time employee during the 2017 calendar year Form 1095-C no later than January 31, 2018 and file Form 1094-C with the IRS (along with the 2017 Forms 1095-C) no later than February 28, 2018 (if filing on paper) or March 31, 2018 (if filing electronically).
- Upon receipt of any Letter 226J, promptly review the Letter and determine whether the employer will accept or contest the proposed penalty amount. Employers have only 30 days to respond.

If your organization receives a Letter 226J, or if you have any questions about your current ACA compliance, we can help. Please contact any of the attorneys listed below or your current Cohen & Grigsby attorney.

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