

Compliance Alert



ACA Pay or Play Penalty Letters Coming “Late 2017”

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As we near closer to Thanksgiving, it's safe to say we are solidly in “late 2017” territory. Last week, the [IRS issued new FAQ guidance](#) (see Q/A-55-58) informing employers that they can expect notice of any potential ACA employer mandate pay or play penalties in “late 2017.” So start checking the mail!

What Will the Letter Look Like?

The IRS recently posted a copy of the Letter 226J here:
<https://www.irs.gov/pub/notices/ltr226j.pdf>

Letters Will Look Back to 2015

The ACA employer mandate pay or play rules first took effect in 2015. The IRS Letters 226J at issue here will relate only to potential penalties in that first year, and therefore they will be relevant only to employers that were applicable large employers (ALEs) in 2015.

In general, an employer was an ALE in 2015 if it (along with any members in its controlled group) employed an average of at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year (2014).

Note that a special 2015 transition rule provided that certain “mid-sized” employers between 50 and 100 full-time employees could have reported an exemption from potential pay or play penalties.

What Are the Potential 2015 Penalties?

a) §4980H(a)—The “A Penalty”

This is the big “sledge hammer” penalty for failure to offer coverage to substantially all full-time employees. In 2015, this standard required an offer of coverage to at least 70% of the ALE’s full-time employees. (For 2016 forward, this standard has been increased to 95%).

The 2015 A Penalty was \$173.33/month (\$2,080 annualized) **multiplied by all full-time employees** reduced by the first 80 full-time employees (reduced by the first 30 full-time employees for 2016 forward). It was triggered by at least one full-time employee who was not offered group coverage enrolling in subsidized coverage on the Exchange.

The reduced 70% threshold for the 2015 penalty should be sufficient for virtually all ALEs in 2015 to avoid the A Penalty, provided they offered a group health plan with eligibility set at 30 hours per week or lower. It would be very unlikely for a surprise A Penalty to arise for 2015.

b) §4980H(b)—The “B Penalty”

This is the much smaller “tack hammer” penalty that will apply where the ALE is not subject to the A Penalty (i.e., the ALE offered coverage to at least 70% of full-time employees in 2015, or 95% thereafter). It applies for each full-time employee who was not offered coverage, offered unaffordable coverage, or offered coverage that did not provide minimum value **and** was enrolled in subsidized coverage on the Exchange.

The 2015 B Penalty was \$260/month (\$3,120 annualized). Unlike the A Penalty, the B Penalty multiplier is only those full-time employees not offered coverage (or offered unaffordable or non-minimum value coverage) who actually enrolled in the Exchange. The multiple is not all full-time employees.

What Happened to My Section 1411 Certification?

In the vast majority of states, they never came!

In short, the 1411 Certification (typically referred to as Employer Exchange Notices) informs the employer that one or more of their employees have been conditionally approved for subsidies (the Advance Premium Tax Credit) to pay for coverage on the exchange.

One important purpose of the notice is it provides employers with the chance to contemporaneously challenge the employee’s subsidy approval. Near the time of the employee’s subsidy approval, the ALE can show that it made an offer of minimum essential coverage to the full-time employee that was affordable and provided minimum value.

In other words, the notices provide the ALE with the opportunity to prevent a) the employee from incorrectly receiving the subsidies, and b) the ALE from ever receiving the Letter 226J from the IRS (because all ACA pay or play penalties are triggered by a full-time employee’s subsidized Exchange enrollment).

See our full [ABD Office Hours on Section 1411 Certifications](#) for full details on the process as intended in the ACA.

[CMS admitted in a September 2015 FAQ](#) that they were not able to send the notices for 2015 for federal exchange enrollment (most state exchanges took the same approach), but the potential penalties will nonetheless still apply.

The result is that ALEs will for be receiving their first notice of potential 2015 penalties via IRS Letter 226J in “late 2017.”

How Does the IRS Determine Potential Penalties?

The 2015 ACA reporting via Forms 1094-C and 1095-C (as well as the employee’s subsidized exchange enrollment data for 2015) serve as the primary basis for the IRS determination.

What Do I Need to Do?

First of all, review the information carefully.

The first-year ACA reporting for 2015 was a particularly difficult one, and one in which [the IRS provided extended deadlines and a good faith efforts standard](#). It is very possible that the numerous challenging systems issues that made the first-year (and, frankly, all subsequent years) ACA reporting so difficult resulted in certain inaccuracies on the 2015 Forms 1094-C and 1095-C.

Be sure to review any potential penalties carefully with your systems records to confirm the reporting was correct.

a) If You Agree with the Penalty Determination

You will complete and return a Form 14764 that is enclosed with the letter, and include full payment for the penalty amount assessed (or pay electronically via EFTPS).

b) If You Disagree with the Penalty Determination

The enclosed Form 14764 will also include a “ESRP Response” form to send to the IRS explaining the basis for your disagreement. You may include any documentation (e.g., employment or offer of coverage records) with the supporting statement.

The response statement will also need to include what changes the ALE would like to make to the Forms 1094-C and/or 1095-C on the enclosed “Employee PTC Listing,” which is a report of the subsidized Exchange enrollment for all of the ALE’s full-time employees. The Letter 226J includes specific instructions on completing this process.

The IRS will respond with a Letter 227 that acknowledges the ALE’s response to Letter 226J and describes any further actions the ALE may need to take. If you disagree with the Letter 227, you can request a “pre-assessment conference” with the IRS Office of Appeals within 30 days from the date of the Letter 227.

If the IRS determines at the end of the correspondence and/or conference that the ALE still owes a penalty, the IRS will issue Notice CP 220J. This is the notice and demand for payment, with a summary of the pay or play penalties due.

What About ACA Repeal and Replace?

It didn’t happen! [The House passed the AHCA](#), but [the Senate subsequently failed to pass the BCRA](#) and numerous alternatives.

Most of the proposed repeal/replace legislation (including the AHCA that passed the House) would have repealed the ACA employer mandate pay or play rules retroactively to the beginning of 2016. It is possible that future legislation in 2018 will be successful in accomplishing that goal, although that would not affect any penalties paid in this 2015 Letter 226J process.

Stay tuned for updates!

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