



Health Care Reform Guidance

Provided by BB&T Insurance Services, Inc., McGriff, Seibels & Williams, Inc., BB&T Insurance Services of California, Inc., and Precept Insurance Solutions, LLC

IRS Pay or Play Enforcement Guidance

Legislative Alert 59-2017 November 9, 2017

Highlights:	<ul style="list-style-type: none">▪ The IRS issued guidance on the employer shared responsibility enforcement process.▪ The IRS plans to issue Letter 226-J to propose and assess employer shared responsibility penalties.▪ No penalties have been assessed under the employer shared responsibility rules at this time.	Important Dates:	<p>November 2, 2017</p> <ul style="list-style-type: none">▪ The IRS issued Q&As on employer shared responsibility enforcement. <p>Late 2017</p> <ul style="list-style-type: none">▪ For the 2015 calendar year, the IRS plans to issue letters informing employers of their liability for a penalty, if any, in late 2017.
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OVERVIEW

On Nov. 2, 2017, the Internal Revenue Service (IRS) updated its [Questions and Answers](#) (Q&As) on the employer shared responsibility rules under the Affordable Care Act (ACA) to include information on enforcement. Specifically, these Q&As include guidance on:

- How an employer will know that it owes an employer shared responsibility penalty;
- Appealing a penalty assessment; and
- Procedures for paying any penalties owed.

The IRS also maintains a [website on understanding Letter 226-J](#), as well as a [sample letter](#), which will be used to inform employers of their potential penalty liability.

ACTION STEPS

No penalties have been assessed under the employer shared responsibility rules at this time. However, employers subject to these rules are still responsible for compliance. These Q&As indicate that, **for the 2015 calendar year, the IRS plans to issue letters informing employers of their potential liability for an employer shared responsibility penalty, if any, in late 2017.**

Background

The ACA's employer shared responsibility rules require applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees or pay a penalty. These rules, also known as the "employer mandate" or "pay or play" rules, only apply to ALEs, which are employers with, on average, at least 50 full-time employees, including full-time equivalent employees, during the preceding calendar year.

The employer shared responsibility rules took effect for most ALEs beginning on **Jan. 1, 2015**. However, some ALEs may have had additional time to comply with these requirements. An ALE may be subject to a penalty only if one or more full-time employees obtain an Exchange subsidy (either because the ALE does not offer health coverage, or offers coverage that is unaffordable or does not provide minimum value).

Prior to 2017, the IRS has been unable to identify the employers potentially subject to an employer shared responsibility penalty or to assess any penalties. The IRS previously [indicated](#) that it expected to begin sending letters in early 2017 informing ALEs that filed Forms 1094-C and 1095-C of their potential liability for an employer shared responsibility penalty for the 2015 calendar year (with reporting in 2016). **However, at this time, no letters have been sent to any ALEs.**

Enforcement Guidance

The general procedures the IRS will use to propose and assess the employer shared responsibility penalties are described in [Letter 226-J](#). The IRS plans to issue Letter 226-J to an ALE if it determines that, for at least one month in the year, one or more of the ALE's full-time employees was enrolled in a qualified health 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).

These letters are separate from the Section 1411 Certification sent by the Department of Health and Human Services (HHS) that employers began receiving in 2016. The Section 1411 Certifications are sent to all employers with employees who receive a subsidy to purchase coverage through an Exchange (including both ALEs and non-ALEs). Section 1411 Certifications do not trigger or assess any penalties for any employers.

Letter 226-J will include:

- A brief explanation of Section 4980H;
- An employer shared responsibility penalty summary table itemizing the proposed penalty by month and indicating for each month if the liability is under Section 4980H(a) or Section 4980H(b) (or neither);
- An explanation of the employer shared responsibility penalty summary table;
- Form 14764, Employer Shared Responsibility Payment (ESRP) Response, an employer shared responsibility response form;
- Form 14765, Employee Premium Tax Credit (PTC) List, which lists, by month, the ALE's assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief—see instructions for Forms 1094-C and 1095-C, line 16), and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C;
- A description of the actions the ALE should take if it agrees or disagrees with the proposed employer shared responsibility penalty in Letter 226-J; and
- A description of the actions the IRS will take if the ALE does not respond to Letter 226-J on time.

The response to Letter 226-J will be due by the response date shown on Letter 226-J, which generally will be **30 days from the date of Letter 226-J**. Letter 226-J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter.

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

For purposes of Letter 226-J, the IRS determination of whether an ALE may be liable for an employer shared responsibility penalty and the amount of the potential penalty is based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed the premium tax credit.

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Appeals

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

If the ALE responds to Letter 226-J, the IRS will acknowledge the ALE's response with an appropriate version of Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226-J 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 penalty, 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 with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on Letter 227, which generally will be 30 days from the date of Letter 227.

If the ALE does not respond to either Letter 226-J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility penalty and issue a notice and demand for payment—Notice CP 220J.

Paying a Penalty

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 penalty, the IRS will assess the employer shared responsibility penalty and issue a notice and demand for payment (Notice CP 220J). Notice CP 220J will:

- Include a summary of the employer shared responsibility penalty and reflect any payments made, credits applied and the balance due, if any; and
- Instruct the ALE how to make a payment, if any.

ALEs will not be required to include the employer shared responsibility penalty on any tax return that they file or make a 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](#).