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## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**EMPLOYER ALERT: IRS BEGINS ASSESSMENT OF ACA PENALTIES**

On November 2, 2017, the Internal Revenue Service (“IRS”) issued long-awaited guidance regarding the assessment of employer shared responsibility penalties under the Affordable Care Act (“ACA”). On its web page addressing frequently asked questions and answers about the ACA employer shared responsibility provisions, the IRS included new FAQs regarding the assessment process for ACA employer shared responsibility penalties.<sup>1</sup> The IRS also updated its website with a page that addresses the form that will be used to notify employers that they may be liable for an employer shared responsibility penalty—Form 226-J.<sup>2</sup> The template Form 226-J is available at <https://www.irs.gov/pub/notices/ltr226j.pdf>. The IRS noted that it would begin sending Form 226-J to employers in late 2017 for employer shared responsibility penalties associated with the 2015 calendar year. Early reports indicate that employers and staffing agencies have already begun to receive Form 226-J; employers should therefore remain alert and prepared to respond to Form 226-J should they receive it, as employers generally have 30 days to respond.

As noted in our previous LEGALcurrents® on the ACA employer shared responsibility provisions and information reporting requirements<sup>3</sup>, “applicable large employers” (“ALEs”) can face a shared responsibility penalty for failing to offer their “full-time” employees (generally, those employees who average 30 hours of service per week over the course of the month, or 130 hours of service in a month) affordable, minimum value health coverage. The ACA information reporting requirements require ALEs to file Forms 1094-C and 1095-C with the IRS to report the health care coverage offered to full-time employees. The information on those forms is used to determine whether an employee is eligible for an income-based premium tax credit or cost-sharing reduction for coverage purchased on a public Exchange (“Exchange Subsidy”), and whether the employer is subject to a shared responsibility penalty. If a full-time employee was not offered affordable, minimum value health coverage by his or her employer, enrolls in coverage through an Exchange, and qualifies for an Exchange Subsidy, the ALE may face a shared responsibility penalty.<sup>4</sup> Until now, the penalty assessment process has remained uncertain.

The IRS Form 226-J guidance notes that Form 226-J is not a formal penalty assessment; rather, it is the IRS’s initial notice to an employer that it may be liable for a shared responsibility penalty. Form 226-J contains a brief overview of the penalty rules and a proposed penalty calculation for the employer, as determined by the IRS. Form 226-J will include Form 14765<sup>5</sup> (the “Employee Premium Tax Credit (“PTC”) Listing), which includes a list

<sup>1</sup> <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Making>

<sup>2</sup> <https://www.irs.gov/individuals/understanding-your-letter-226-j>

<sup>3</sup> [https://www.hsela.com/files/Patient\\_Protection\\_and\\_Affordable\\_Care\\_Act\\_October\\_2014.pdf](https://www.hsela.com/files/Patient_Protection_and_Affordable_Care_Act_October_2014.pdf)

<sup>4</sup> In general, the penalty amount will be higher if an ALE failed to offer coverage to “substantially all” of its full-time employees. For 2015, the “substantially all” standard was satisfied for a month if an ALE offered coverage to at least 70% of its full-time employees for that month; beginning in 2016, the threshold increased to 95%. See [https://www.hsela.com/files/Patient\\_Protection\\_and\\_Affordable\\_Care\\_Act\\_October\\_2014.pdf](https://www.hsela.com/files/Patient_Protection_and_Affordable_Care_Act_October_2014.pdf) for a detailed discussion on how the penalty is calculated.

<sup>5</sup> <https://www.irs.gov/pub/irs-pdf/f14765.pdf>

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of all of the employees who are alleged to have triggered a shared responsibility penalty for a given month, and whether any safe harbor or other penalty relief was reported for the applicable month(s). Employers should diligently review the Employee PTC Listing and their records for possible safe harbor or other penalty relief reporting errors. Employers are instructed to carefully read Form 226-J and follow the prescribed steps based on whether the employer agrees or disagrees with the notice. The employer must respond by the response date noted on Form 226-J, which will generally be 30 days from the date the form was sent.

If an employer agrees with the proposed penalty assessment, it simply completes and returns the enclosed Form 14764<sup>6</sup> (the Employer Shared Responsibility Penalty (“ESRP”) Response) with payment by check or money order, or, if enrolled in the Electronic Federal Tax Payment System, electronic payment.

If an employer disagrees with the penalty assessment, it is instructed to complete and return the ESRP Response (Form 14764) with a signed statement explaining why the employer disagrees with all or part of the proposed penalty assessment, including any supporting documentation. Employers are also instructed to make any corrective changes, if applicable, to the Employee PTC Listing (Form 14765) to report the code for applicable safe harbor or other penalty relief that applied to an employee for the month(s) at issue. Form 226-J clarifies that employers should not file corrected Forms 1095-C with the IRS to report requested changes to the Employee PTC Listing (Form 14765). An employer that wishes to appoint an authorized individual, such as its benefits counsel or other advisor, to assist in the appeal and correspond with the IRS on its behalf should list such individual on the ESRP Response (Form 14764).

The IRS will acknowledge receipt of the employer’s response to Form 226-J by sending Form 227<sup>7</sup> (a series of five different letters that acknowledge the employer’s response to Form 226-J and describe further actions the employer may need to take, as well as appeal rights). If an employer does not respond to Form 226-J by the response date, the IRS will send the employer a formal notice and demand for payment on Notice CP 220J<sup>8</sup>. Although an employer will also have the ability to appeal a penalty assessment under the formal Notice CP 220J, employers should contest (or pay) any proposed penalty assessment in Form 226-J before the formal notice and demand in Notice CP 220J is issued.

### Next Steps

Because the potential shared responsibility penalties could be significant, employers that receive Form 226-J should work quickly to respond. This may require coordinating with legal counsel and any third-party vendors that assisted in the employers’ ACA reporting on Forms 1094-C and 1095-C.

Should you have any questions regarding this LEGALcurrents®, your compliance with the employer shared responsibility provisions and reporting requirements, or any other matter discussed herein, please do not hesitate to contact any member of our firm’s Employee Benefits and Executive Compensation Practice Area at 585.232.6500.

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<sup>6</sup> <https://www.irs.gov/pub/irs-pdf/fl14764.pdf>

<sup>7</sup> Sample unavailable at publication.

<sup>8</sup> Sample unavailable at publication.

