



NOVEMBER 9, 2017

Employer Mandate Enforcement Begins

“We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.” -IRS Letter 226J

Over the next several weeks, thousands of employers across the United States will receive, for the first time, letters beginning with the ominous statement above. These letters mark the beginning of IRS enforcement of the employer mandate under the Affordable Care Act (i.e., the assessment of tax penalties against large employers failing to provide affordable, minimum value health coverage to substantially all employees). The initiation of active enforcement efforts now comes as a surprise, as many anticipated that the IRS would not begin such efforts under the Trump administration.

SHOULD I BE WORRIED?

Assessment letters will be sent to all employer the IRS believes owe ANY penalty under the ACA’s employer mandate. Generally speaking, this should only include “applicable large employers”—an employer averaging 50 or more full-time employees in the prior calendar year. Within this population, an assessment could be issued if affordable, minimum value coverage was not offered to even one full-time employee who received federally-subsidized health coverage. Of course, the magnitude of any assessment could vary dramatically based on any number of complex regulations underlying the employer mandate rules themselves.

In official Q&As updated on November 1, the IRS stated that letters relating to the 2015 calendar year will be issued in late 2017—but, on November 8, the *Wall Street Journal* reported that letters were already in the mail.

Any employer anticipating, they COULD be receiving an assessment should be on the lookout. Under the IRS assessment procedures, employers will be required to either pay the assessment or file a formal response with the IRS **WITHIN 30 DAYS** of the date on the initial IRS letter.

THE LETTER CAME...WHY ME?

The IRS is currently basing its enforcement efforts on a combination of IRS Forms 1094-C and 1095-C, and information reported by individuals purchasing federally-subsidized health care. Stated differently—the IRS is relying on a combination of information reported by employers themselves in required tax filings, and self-reported information provided by individuals signing up for health insurance. This suggests that many of the IRS’s initial determinations will be challenged.



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Among the reasons we expect for employers to receive assessments are:

- **Anticipated and Appropriately Assessed Tax.**

While these assessments may be in the minority, some employers made a purposeful choice not to provide some or all of the coverage required to avoid penalties under the ACA. This category may include not only those employers who elected not to provide any coverage, but also those who decided to assume small risks (such as setting premiums at a level that was unaffordable for a small proportion of employees).

- **Unanticipated, but Appropriately Assessed Tax.**

Unfortunately, some employers receiving accurate assessments may be caught off guard. The requirements surrounding the employer mandate are exceedingly complex, and even best efforts are not always enough. Thus, it's possible that employers trying to comply didn't get their plan design quite right.

In other cases, there may be questions on assessments related to specific individuals. The assessment letters from the IRS will include employee-level detail, including name, truncated SSNs and reporting codes pulled directly from that individual's Form 1095-C.

- **ACA Reporting Errors.**

The vast majority of assessment letters will be triggered by ACA reporting errors. As noted above, the IRS is relying on Forms 1094-C and 1095-C to compile its assessments. This means the IRS is not looking at any employer information other than what the employer itself submitted to the IRS.

So why then, did an employer who offered all of its employee's free health insurance receive an assessment for \$5,000,000? * Possibly, because the employer inadvertently checked the "No" box, when it should have checked the "Yes" box on Part III, Line 23 of the 2015 Form 1094-C it filed a year and a half ago.

The \$5 million dollar penalty in the preceding paragraph was completely made up to illustrate the point. However, even the most diligent of employers are likely to have had trouble mastering the complicated rules underlying the Form 1095-C codes.

Where assessments are based on ACA reporting errors, employers will have the opportunity to make substantive updates to their reports through written correspondence with the enforcement office. (The assessment letter specifically directs the employer not to file corrected Forms through the IRS reporting system.)

WHAT NOW??!!

If you receive an assessment letter, ACT QUICKLY. As noted above, employers will have 30 days from the date of an assessment letter to respond. If the IRS does not receive a response (or a payment) within that period, it will issue a Notice and Demand for Payment. This is the official employer mandate tax "bill" and once issued, it will be significantly more difficult to contest any assessment.

When an employer submits a timely response, the IRS will review the employer's reasons for contesting the assessment and issue an updated determination. If an employer disagrees at this point, it will have the right to request a pre-assessment conference with the IRS Office of Appeals.

As complicated as it has been to comply with the ACA to date, we recognize that for employers receiving these assessments, responding in an accurate and timely manner may be the biggest challenge yet.

The KELLY Benefits Strategies team is committed to helping our clients address all of their benefits compliance challenges. As always, please feel free to reach out to any member of your KBS team with general questions about any assessment you receive. We are also happy to make the consulting services of our compliance partner, MZQ Consulting, available to all KBS groups. The team at MZQ will be available to work directly with you and your KBS team to formulate IRS response strategies and prepare responses on your behalf. For more information, e-mail ACAhelp@mzqconsulting.com.

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