



Best Practices for Handling IRS ACA Penalty Letters

CARLTON C. PILGER

Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com

Phone: (404) 240-4141

www.fisherphillips.com



Agenda



- The Affordable Care Act (ACA) requires applicable large employers (ALEs) to provide minimum essential coverage to eligible employees.
- The IRS enforces this requirement based on information employers report on Forms 1094 and 1095.
- The IRS might issue Letter 226J, an initial penalty letter assessing liability for the ACA's Employer Shared Responsibility Payment (ESRP) for information it believes is incorrect or incomplete ; or it might issue the penalty letter based on the number of Forms W-2 filed and the absence of filed Forms 1094 and 1095.



Agenda



- This webinar will address the best practices in this area, including:
 - Employer Shared Responsibility Rules
 - Letter 226J: IRS Employer Shared Responsibility Payment Assessments
 - How to respond to Letter 226J
 - Requesting extensions
 - Completing Response Form 14764
 - Amending IRS Forms 1094 and 1095
 - Penalty calculations
 - Challenging penalty calculations
 - Completing Form 14765 (PTC Listing)
 - IRS Notice 972CG: ACA Reporting Failures
 - Common Reporting Errors
 - Examples



EMPLOYER SHARED RESPONSIBILITY RULES

BACKGROUND



- An ALE that fails to offer minimum essential coverage (“MEC”) to full-time (FT) employees and their dependents (i.e., children) may be subject to a penalty under Internal Revenue Code (IRC) section 4980H(a) if a FT employee enrolls in Marketplace coverage and receives a premium tax credit (aka subsidy) for the coverage.
- An ALE that offers MEC to its FT employees (and dependents) may be subject to a penalty under IRC section 4980H(b) if a FT employee receives a premium tax credit (aka subsidy) for Marketplace coverage where the employer’s offer of MEC is either unaffordable or fails to provide minimum value.

DEFINING ALE



Who is an ALE?

- ALE is employer with 50 or more full-time (FT) and full-time equivalent (FTE) employees.
- A FT employee for any calendar month is an employee who averages 30 hours or more of service per week during the calendar month, or at least 130 hours of service during the calendar month.
- To determine the number of FTEs an employer has:
 - Add the number of hours of service of all non-FT employees for the month up to a maximum of 120 for any employee.
 - Divide the result by 120.
- When FT and FTE are added and the total is 50 or more, employer is an ALE and must comply with ACA's shared responsibility rules and employer reporting duties.

DEFINING ALE



Beware the “gotchas”

- ALE status determined on a controlled group basis.
- Based on **prior** calendar year employee count.
 - Liability for, and the amount of, the excise tax is computed and assessed separately for each ALE member.
 - Each ALE member is responsible for health coverage reporting.
- Example:
 - ABC Company has 35 FT employees but is part of a controlled group with XYZ Company, which has 20 FT employees; total FT count for the group is 55.
 - Both companies are ALEs, are subject to ESRP provisions and must complete and file separate Forms 1094 & 1095.



ACA ALE REPORTING REQUIREMENTS





2021 ACA REPORTING CYCLE



- **2021 Forms 1094-C and 1095-C and Instructions**

- Draft Forms and Final Instructions essentially mirror 2020 Forms and Instructions.

- [Draft Form 1094-C](#)

- [Draft Form 1095-C](#)

- [Instructions for Forms 1094-C & 1095-C](#)

- IRS should issue final 2021 Forms soon.



IRS FILING



▪ How and When?

- Returns due in year after the reporting year:
 - February 28, if paper; March 31, if electronic
- Employers filing fewer than 250 Forms 1095 may file paper forms; employers filing 250 or more Forms 1095 must file electronically using [IRS e-filing system](#).
 - Employers can seek electronic filing waiver using IRS Form 8508 at least 45 days before the return due date.



REPORTING FAILURE PENALTIES



- Failure to file with IRS:
 - \$280 per return; \$3,392,000 cap per calendar year.
- Failure to provide statements to FT employees:
 - \$280 per statement; \$3,392,000 cap per calendar year.



DEADLINE EXTENSIONS



- Filing with IRS
 - Automatic 30-day extension by submitting [Form 8809](#) on or before filing due date.
 - Additional extension possible for certain hardships.

- Providing to full-time employees
 - Letter request to IRS postmarked by date on which individual statements due.
 - IRS annually has granted all filers automatic extension, but has yet to do so for 2021 filings.



LETTER 226J: IRS ESRP ASSESSMENTS



EMPLOYER SHARED RESPONSIBILITY PAYMENTS



▪ Employer Shared Responsibility Assessments and Appeals

- The IRS penalizes employers that fail to comply with their employer shared responsibility (ESR) obligations under the ACA.
- IRS issues Letter 226J to propose and assess ESR penalties.
- Letter 226J details how the IRS calculated the penalty and directs ALE as to paying or disputing its assessment.

Action items

- Consider engaging legal counsel.
- Respond to Letter 226J timely and completely; appeals are more difficult if an ALE misses its chance during 226J process.
- Respond by due date on front of Letter 226J; but best practice is to immediately request an extension.
- Review relevant Forms 1094-C and 1095-C; coordinate with third party that assisted in process.



How to respond to an IRS penalty letter



- Be prompt
- Be professional
- Be prepared



Completing Response Form 14764



- Indicate agreement or partial or full disagreement
- Indicate no payment (do not leave blank)
- Authorize representative (if needed)



Requesting Extensions



- Immediately request extension; be reasonable.
- Inform IRS that you are engaged and cooperative.
- Do not unnecessarily disclose potential systemic issues.



Amending IRS Forms 1094 and 1095



- Locate applicable forms; might be housed offsite.
- Carefully review Letter 226J for IRS methodology.
- Identify errors that led to IRS conclusions.
- Specifically recite what errors or omissions need to be corrected.



Penalty Calculations



- Do the math.
- Carefully examine for mistakes including failure to apply automatic headcount reduction.



Challenging Penalty Calculations



- Provide details and show work.
- Specify items where IRS calculations are erroneous.



Completing Form 14765 (PTC Listing)



- Examine original forms that correspond to IRS assertions.
- Use bottom line for each employee on list to indicate correct code.
- Use only one code even if multiple codes could apply.

EMPLOYER SHARED RESPONSIBILITY PENALTIES

- **Employer Shared Responsibility Assessments and Appeals**
 - Dispute IRS calculations using Form 14764 (included with Letter 226J).
 - Attach signed statement explaining disagreement; provide details and specifics and be mindful of tone.
 - Detail necessary changes to Forms-1094-C; **DO NOT RE-FILE.**
 - Make changes on Employee PTC Listing.
 - Use same codes as on Form 1094-C and 1095-C; **DO NOT FILE CORRECTED FORMS 1095-C.**
 - Use only one code even if more than one could apply.
 - Include additional supporting documentation; precision counts.
 - Include tax year and EIN on top right corner of every page of submission.



LETTER 972CG: IRS PENALTY ASSESSMENTS FOR ACA REPORTING FAILURES

REPORTING FAILURE PENALTIES

- IRS issuing more Notice 972CG (“Notice of Proposed Civil Penalty”) following 2020 report from Treasury Inspector General for Tax Administration.
- Penalties on ALEs that fail to file Forms 1094 and 1095, file late, use incorrect media or format, or file with missing or incorrect Tax Identification Numbers (TINs).
- Employers must respond to IRS within 45 days but can ask for extension.
- ALEs that respond to Notice 972CG should expect to receive:
 - Letter 1948C request for additional information or confirmation of reasonable cause waiver, or
 - Letter 845C failure to establish reasonable cause, demand for payment and explanation of appeal rights.

REPORTING FAILURE PENALTIES

- IRS is targeting ACA reporting errors and less likely to give relief as in past filing years.
- Employers should make sure they are following regulations regarding soliciting employee TINs.
- If employer receives Letter 972CG, engage tax counsel with experience in handling this type of dispute.



COMMON REPORTING ERRORS



COMMON ERRORS



- ALE status determination
 - Analyze 2020 employee count to determine ALE status for 2021.
 - Consider engaging resources to assist with ACA reporting.
- Untimely preparing, distributing and filing Form 1095-C
- HR tech concerns
- Corporate transaction issues
 - Entity can gain or lose ALE status and impact reporting obligations.



EXAMPLES



EXAMPLE #1



Failure to check correct box on Form 1094-C

- For all of 2019 ALE offered affordable minimum value MEC, and ALE made an offer of coverage to all FT employees and their spouses and dependents.
- 20 employees declined ALE's offer of coverage for 2019 and qualified for tax credits for Marketplace coverage.
- ALE mistakenly failed to report on Form 1094-C, Part III, Column (a) that it offered MEC to at least 70% of its full-time employees in 2019.
- IRS issued Letter 226J proposing more than \$1 million in penalties for failing to offer MEC to at least 70% of its FT employees.
- ALE responded timely to Letter 226J and provided a signed statement requesting correction to Form 1094-C.
- ALE also updated and corrected the applicable codes entered on Form 1095-C for each of the 20 employees who received Marketplace coverage tax credits.
- IRS accepted ALE's submission and reduced penalty to \$0.

EXAMPLE #2



Omitting affordability safe harbor codes from Form 1095-C

- ALE offered affordable minimum value MEC (determined using W-2 safe harbor) to all full-time employees and their spouses and dependents.
- Several employees declined offer of coverage and qualified for premium tax credits (PTC) for their Marketplace coverage.
- ALE prepared Forms 1095-C but omitted W-2 safe harbor code (2F) on Part II, Line 16.
- IRS sent Letter 226J identifying employees who received PTCs, and a proposed ESRP assessment.
- ALE timely responded and stated that it disagreed with the proposed penalty assessment and provided safe the proper safe harbor code for the affected employees.
- IRS accepted the information and determined that ALE owed no penalty.



Questions?



HRCI –

SHRM –



CARLTON C. PILGER

Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com

Phone: (404) 240-4141

www.fisherphillips.com



Thank You

CARLTON C. PILGER

Of Counsel
Fisher Phillips

Email: cpilger@fisherphillips.com

Phone: (404) 240-4141

www.fisherphillips.com