**IRS EMPLOYER MANDATE PENALTY GUIDANCE**

The Internal Revenue Service (IRS) is continuing to issue employer assessment letters and is now sending letters for the 2016 reporting year. Employer assessment letters are triggered if the IRS receives notice from a Healthcare Exchange that an employee has received a Premium Tax Credit (PTC).

Responding quickly to the IRS inquiry is essential, as employers must respond with 30 days of the date on the letter.

This document provides a brief background and information on the process employers should take to respond.

**Background**

As a reminder, in general, an applicable large employer may owe an Employer Shared Responsibility Payment (ESRP), under Code [§ 4980H](https://checkpoint.riag.com/app/main/docLinkNew?DocID=i892c2c603b4c11dfa64b0a48868caa77&SrcDocId=T0EBIAWKLY%3A26254.1-1&feature=tcheckpoint&lastCpReqId=11136bb" \t "_top), if the employer did not qualify for any of the transition relief options and the employer:

1. Did not offer health coverage or offered coverage to less than 70 percent (in 2015, increased to 95% beginning in 2016) of its full-time employees (and their dependents), and at least one of the full-time employees received a premium tax credit (PTC) through a Marketplace; **or**
2. Offered coverage to at least 70 percent (in 2015, increased to 95% beginning in 2016) of its full-time employees (and their dependents), but at least one full-time employee received a premium tax credit through a Marketplace, because the coverage offered did not meet the minimum value requirements and/or was not deemed affordable.

The annual penalties are listed below and are indexed each year for inflation:

|  |  |  |
| --- | --- | --- |
| Penalty Type | “A” | “B” |
| Formula | Times all full-time employees | For each affected employee |
| 2015 | $2,080(minus first 80 employees) | $3,120 |
| 2016 | $2,160 | $3,240 |
| 2017 | $2,260 | $3,390 |
| 2018 | $2,320 | $3,480 |
| 2019 | $2,500 | $3,750 |

**Penalty Letter Process**

**Step 1: IRS Sends Letter**

The IRS issues Letter 226J informing an employer of their potential liability if they determine that, for at least one month in the year, at least one of the employer’s full-time employees was enrolled in subsidized coverage through the Marketplace and the employer did not qualify for transition relief.

The letter will likely be addressed to the contact identified on the 1094-C for the EIN, however, there are no guarantees. Employers should notify each entity and all mail rooms to be on the alert for letters from “The Department of Treasury, Internal Revenue Service.”

The letter will provide instructions for how the employer should respond, including:

* a brief explanation of the provisions of IRS Code Section 4980H;
* an ESRP summary table, with instructions, itemizing the “proposed” penalty by month and whether the liability is an “A” penalty or a “B” penalty, based on information reported to the IRS on Forms 1094-C and 1095-C compared to information received from the Marketplace;
* a description of the actions the employer should take if it agrees or disagrees with the proposed payment amount;
* a description of the actions the IRS will take if the employer does not respond timely; and
* the name and contact information of a specific IRS employee that the employer should contact if there are any questions about the letter.

The Letter will be accompanied by several enclosures, including:

* Form 14765 - Employee Premium Tax Credit List, this spreadsheet lists, by month, the full-time employees who were allowed a premium tax credit, as well as any indicator codes reported on Lines 14 and 16 of the employee’s Form 1095-C. Any month not highlighted on the form is a month that the employee received a premium tax credit, thus indicating that the employer is subject to a penalty for that employee for that month.
* Form 14764 – ESRP Response, this is the response form that the employer completes to indicate its agreement with the penalty amount proposed by the IRS, or its disagreement with all or part of the proposed amount.

**Step 2: Employer Investigation**

The employer should review the list of employees on Form 14765 and verify the accuracy of the data provided by the IRS. Employers may have to work with human resources, legal, benefits, payroll, and finance departments as well as outside vendors housing your ACA data to collect, verify, and prove the accuracy of information.

The instructions specifically suggest that the employer use Form(s) 1094-C and 1095-C for the review.

If there are discrepancies, documentation may be required to, among other things, prove:

* The employee was not full-time, which may include proof of accurate measurement and stability period record keeping for variable hour employees,
* There was an offer of minimum value coverage, or
* The offer was affordable, including providing W-2 records

**Step 3: Employer Response Using Form 14764**

Accept Assessment

If all information is accurate and the employer accepts the “proposed” assessment, the employer must complete the enclosed Form 14764, ESRP and return it with payment in the envelope provided or use the Electronic Federal Tax Payment System to remit payment, by the date on the letter. If the entire amount is not paid, the employer will receive a, Notice CP 220J - Notice and Demand for Payment, for the balance due.

Disagree with Assessment

If there is any inaccurate information that changes the “proposed” assessment, the employer must complete the enclosed Form 14764, ESRP by providing a signed statement with a full explanation explaining why there is a disagreement.

* If Form 1094-C is incorrect, the employer must provide documentation supporting the reasons and provide the changes to Form 1094-C. The employer does not transmit a corrected Form 1094-C to the IRS.
* If the information on the enclosed Form 114765, the Employee PTC Listing, is incorrect, the employer must update the Employee PTC Listing with the corrected codes and include any supporting documentation for the change. Be sure to describe in detail any methodologies/calculations/code reasons to support the reply. The employer does not transmit a corrected Form 1095-C to the IRS or send a correct 1095-C to the employee.

A timely response is critical as the employer must respond by the date indicated on the Letter 226J, and the employer generally only has 30 days from the date of Letter.

**Step 4: IRS Response to Employer Appeal Using Letter 227**

The IRS will acknowledge receipt of Form 14764 with one of 5 versions of Letter 227, which will close an ESRP inquiry or provide information on next steps, they are:

* [**Letter 227-J**](https://www.irs.gov/pub/notices/ltr227j.pdf) acknowledges receipt of the signed agreement [Form 14764](https://www.irs.gov/pub/irs-pdf/f14764.pdf), ESRP Response, and that the ESRP will be assessed. After issuance of this letter, the case will be closed. No response is required.
* [Letter 227-K](https://www.irs.gov/pub/notices/ltr227k.pdf)acknowledges receipt of the information provided and shows the ESRP has been reduced to zero. After issuance of this letter, the case will be closed. No response is required.
* [**Letter 227-L**](https://www.irs.gov/pub/notices/ltr227l.pdf) acknowledges receipt of the information provided and shows the ESRP has been revised. The letter includes an updated [Form 14765](https://www.irs.gov/pub/irs-pdf/f14765.pdf) (PTC Listing) and revised calculation table. The ALE can agree or request a meeting with the manager and/or appeals.
* [**Letter 227-M**](https://www.irs.gov/pub/notices/ltr227m.pdf) acknowledges receipt of information provided and shows that the ESRP did not change. The letter provides an updated [Form 14765](https://www.irs.gov/pub/irs-pdf/f14765.pdf) (PTC Listing) and revised calculation table. The ALE can agree or request a meeting with the manager and/or appeals.
* [Letter 227-N](https://www.irs.gov/pub/notices/ltr227n.pdf)acknowledges the decision reached in Appeals and shows the ESRP based on the Appeals review. After issuance of this letter, the case will be closed. No response is required.

If after receipt of Letter 227 the employer accepts the proposed or revised assessment, no further action is required. The IRS will follow-up by issuing Notice CP 220J - Notice and Demand for Payment with the proposed or revised amount from Letter 227. The notice will provide directions and alternatives for paying the assessment.

If after receipt of Letter 227 the employer disagrees with the proposed or revised assessment, the employer may request a pre-assessment conference with the IRS Office of Appeals. The employer should follow the instructions provided in Letter 227 (also refer to IRS Publication 5) for requesting a conference with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on the Letter 227, which generally will be 30 days from the date of the letter.

**Step 5: Paying the Assessment**

If applicable, Notice CP 220J will include a summary of the employer’s payment responsibility and will reflect payments made, credits applied, and the balance due, if any. The notice will instruct the employer how to make payment, if any. Employers will not be required to include the payment on any tax return that they file or to make payment before notice and demand for payment. In addition, employers may have the ability to make installment payments, as described in IRS Publication 594. Failure to pay the ESRP could result in IRS lien and levy enforcement actions and interest will accrue until it is paid.

**Conclusion**

To avoid or minimize the chances of getting an assessment letter, employers that receive subsidy notification letters from the Marketplace during the year should consider appealing them when there is a basis to do so.

**Helpful Links**

For further details, please refer to the IRS FAQs (in particular, Numbers 52 through 58) at:
<https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Making>

Here is the link to Letter 226J: <https://www.irs.gov/pub/notices/ltr226j.pdf>

This link provides instructions related to Letter 226J: <https://www.irs.gov/individuals/understanding-your-letter-226-j>

This link provides instructions related to Letters 227:

<https://www.irs.gov/individuals/understanding-your-letter-227>

This link on understanding an IRS notice letter may also be helpful:

<https://www.irs.gov/individuals/understanding-your-irs-notice-or-letter>

This is the link to Form 14765:

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

This is the link to Form 14764:

<https://www.irs.gov/pub/irs-pdf/f14764.pdf>

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