

WS&Co. Compliance Alert

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IRS Plans to Issue ACA Section 4980H Penalty Notices to Employers in Late 2017

The IRS has announced plans to begin collection of payments due from employers for failure to meet the requirements of the Affordable Care Act (ACA) section 4980H employer shared responsibility rules (often called the ACA employer mandate.) The IRS recently updated its ACA FAQ page with new details about the process it plans to use to collect the employer payments. Applicable Large Employers (employers with 50 or more full-time equivalents) could see the IRS activity very soon. The FAQ states that the IRS plans to begin issuing letters “in late 2017” for coverage offered during 2015.

Background

Section 4980H requires applicable large employers to offer coverage to full-time employees and their dependent children. Employers who fail to do so face two different potential penalties under section 4980H.

Section 4980H(a) – Offer Coverage to “Substantially All” Full-Time Employees

The so-called “(a) penalty” is based on whether the employer made an offer of coverage to enough of their full-time employees. For 2015, an employer who fails to offer minimum essential coverage (MEC) to 70% of all full-time employees (and their dependent children) faces a potential penalty of \$173.33/month multiplied by the total number of full-time employees (not counting the first 80.) At least one full-time employee must have purchased individual health insurance through a public Exchange/Marketplace and received a premium tax credit to trigger the (a) penalty.

Section 4980H(b) – Failure to Offer Affordable Minimum Value Coverage

The “(b) penalty” applies if an employer fails to make an affordable offer of minimum value coverage to a full-time employee, and that employee enrolls in individual coverage through a public Exchange/Marketplace and qualifies for the premium tax credit. For 2015, the (b) penalty is \$260/month for each full-time employee who receives the tax credit.

A full-time employee can qualify for ACA subsidies only if (1) they are not eligible for the employer plan, (2) the employer’s plan is unaffordable (as defined by the ACA) for employee-only coverage, or (3) the plan is not a minimum value plan (generally a plan with at least a 60% actuarial value.)

The Section 4980H Collection Process

The IRS has been processing data submitted by employers on forms 1094-C and 1095-C to determine section 4980H liability. The IRS FAQ provides some detail about how the process will work.

The IRS will issue [Letter 226J](#) to an employer if it determines that one or more of the employer’s full-time employees were enrolled in an Exchange/Marketplace-based health

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plan and receiving a premium tax credit, and no safe harbor applies. Letter 226J will include, among other things:

- A payment summary table itemizing the proposed payment by month;
- An employer response form, Form 14764, “ESRP Response”;
- An “Employee Premium Tax Credit (PTC) List” that lists, by month, the employer’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
- A description of the actions the employer should take if it agrees or disagrees with the proposed employer shared responsibility payment in Letter 226J.

Employers will have an opportunity to respond to Letter 226J before any employer shared responsibility liability is assessed and notice and demand for payment is made. The employer response will generally be due 30 days from the date of Letter 226J.

Important 2015 Transition Rules

The regulations contain several important transition rules for 2015, some of which delay when the rules will affect certain employers, and others that change how certain measurements and calculations are treated. Employers who receive a Letter 226J may need to consider some of these rules, including additional transition criteria the employer may need to meet, in determining their final liability.

Section 4980H only applied to employers with at least 100 FTE in 2015 – Enforcement of the shared responsibility rules was delayed until 2016 for employers with fewer than 100 full-time equivalents (FTEs.) To determine the number of FTEs, the employer must use the existing section 4980H counting methodology. To determine employer size for purposes of this delay, an employer is allowed to use any six consecutive months of employment data in 2014.

95% margin of error rule will be 70% for 2015 only – For 2015, employers will not face any section 4980H(a) liability as long as coverage is offered to at least 70% of all full-time employees. Full-time employees not offered coverage could still qualify for subsidized individual health insurance through a public exchange, which would expose an employer to the section 4980H(b) payment of \$260/month for each employee receiving a subsidy.

Section 4980H(a) payment not applied to first 80 full-time employees for 2015 – When payments under 4980H(a) are calculated for an employer who fails to offer MEC to at least 70% of all full-time employees, the first 80 full-time employees are ignored. This waiver of 80 employees rule applies only to 2015. Beginning in 2016, the section 4980H(a) payment will be based on the number of full-time employees, not counting the first 30.

Offering dependent coverage – To avoid section 4980H payments, an employer must make an offer of coverage to full-time employees and their dependents (offering coverage to the employee spouse is not required.) In 2015, no payment will be due for plans that do not currently offer coverage to dependents, if the plan is taking steps during 2015 to do so in 2016.

Non-Calendar Year Plans – Employers with 100 or more FTEs and a non-calendar plan year do not have to comply until the beginning of the plan’s 2015 plan year, as long as the employer has not changed their plan year after 2012, and other offers of coverage criteria are met.

Summary

Considering the activity in Congress and recent action by the Trump Administration, employers may have been hoping that the IRS would delay enforcement of the section 4980H employer requirements. However, the release of these collection plans makes it clear that the IRS plans to move forward under the current law and rules. The full text of the IRS FAQ can be found [here](#).

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