Cooley

Employers Beware: The IRS Has Begun Enforcing Employer Penalties Under the ACA

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Businesses should be aware that the IRS has initiated enforcement of the employer shared responsibility provisions of the Affordable Care Act (the "Act") – which could mean your business is about to receive (if it hasn't already) a notice from the IRS proposing significant penalties. The employer shared responsibility provisions generally mandate that employers with an average of 50 or more full-time employees (including full-time equivalent employees) offer health insurance coverage to eligible employees and their dependents.[1] Applicable large employers who do not offer sufficient coverage as required under the Act may be subject to an employer shared responsibility payment (ESRP). The IRS announced that it would be issuing notices of potential liability to employers for the 2015 calendar year in late 2017.

The IRS uses Letter 226J to notify employers that they may be liable for an ESRP. The IRS is issuing Letter 226J to employers for whom it has determined that, for at least one month in the year, at least one full-time employee was enrolled in a qualified health plan for which a premium tax credit was allowed and the employer did not qualify for an affordability safe harbor or other relief for the employee.

The IRS determines whether an employer may be liable for an ESRP based on the information reported by the employer on Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, and Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and the information reported on the employees' individual income tax returns. Thus, if the information reported to the IRS by the employer or employee is incorrect, the IRS's ESRP determination may be erroneous. Accordingly, once an employer receives a Letter 226J, it should carefully review the information that it previously submitted to the IRS before determining whether it agrees with the IRS's proposed ESRP.

Included with the Letter 226J sent to employers is Form 14764 (ESRP Response), which allows the employer to indicate whether it agrees or disagrees with the IRS's determination. If the employer disagrees with the determination, the employer must submit a completed Form 14764 to the IRS by the response date reflected on the first page of the Letter 226J, which generally will be 30 days from the date of the Letter 226J. If the employer does not submit a response within the 30-day period, the IRS will proceed with assessment of the ESRP and send the employer a notice and demand for payment, after which the ESRP could be subject to IRS collection action.

If the employer submits a response to the Letter 226J, the IRS should acknowledge the response by sending the employer an appropriate version of Letter 227. If the employer still disagrees with the IRS's determination, the employer may request a conference with the IRS Office of Appeals. A conference with the IRS Office of Appeals must be requested in writing by the response date shown in the Letter 227, which generally will be 30 days from the date of the Letter 227. If the employer does not respond to the Letter 227, the IRS will proceed with assessing the ESRP and send a notice and demand for payment.

If you have any questions about this alert, please contact one of the attorneys listed here.

Notes

1. Although the employer shared responsibility provisions generally became effective in 2015, there were several forms of transition relief available for that year. There were also certain forms of transition relief for 2016, although the circumstances for such relief are more limited.