



## The IRS Has Begun the Collection Process Under ACA §4980H Employer Shared Responsibility (Employer Mandate) Rules

Issue Date: November 2017

### Background

The Affordable Care Act (ACA) contains requirements called the employer shared responsibility rules (often called the employer mandate). Code §4980H requires applicable large employers (ALEs – those with 50 or more full-time equivalents) to offer coverage to full-time employees and their dependent children. Employers who fail to do so face two different potential penalties. The IRS has begun to send letters to employers (Letter 226J) to begin the collection process for employers who have failed to meet the §4980H requirements for benefits offered during 2015. Penalty calculations are based on data provided by employers to the IRS on Forms 1094 and 1095. There are two different penalties that could apply to ALE, but only one would apply for any particular tax year. We believe that many of the 226J proposed employer assessments will be applied due to mistakes made in employer reporting, rather than to an actual violation of a §4980H requirement.

### §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). Example of a §4980H(a) penalty:

- An employer with 200 full-time (FT) employees fails to offer coverage to 70% of the FT employees for 9 months of 2015.
  - 2015 penalty = \$187,196.40
  - \$173.33 times 120 (FT employees not counting first 80) = \$20,799.60 per month times 9 months = \$187,196.40

### §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 (PTC). For 2015, the (b) penalty is \$260/month for each full-time employee who receives a PTC. Example of a §4980H(b) penalty:

- 2 full-time employees are not offered affordable coverage. One receives a PTC for 6 months, the other for 12 months.
  - 2015 penalty = \$4,680
  - Employee 1: \$260 times 6 months = \$1,560; Employee 2: \$260 times 12 months = \$3,120

### What an Employer Should Do upon Receiving a Letter 226J

Most importantly, the employer must act quickly. An employer has only 30 days to respond to the IRS. The IRS will initiate a collection process if an employer fails to respond on a timely basis.

- Call the IRS number included on the Form 14764 and request a 30-day extension to respond.
- Contact the entity (accounting firm or law firm) that you use to communicate directly with the IRS for tax-related issues.
- Contact Frenkel to help collect data necessary to respond to the IRS.
- See the enclosed flow chart and Q&A for more details on responding to the IRS.

### We Can Help

Frenkel Benefits has a team of §4980H and ACA reporting experts who can help our clients understand the Letter 226J and provide assistance in developing your response to the IRS.

## **Q&A**

**QUESTION 1:** What is the IRS process for assessing penalties under the Affordable Care Act?

**ANSWER 1:** The IRS has been busy reviewing ACA employer reporting forms filed for plan years that began in 2015. Based on this review, they started sending “Letters 226J” in early November. These letters will go to the individual listed as the contact person on line 7 of Form 1094-C. Some employers will have filed more than one Form 1094-C and will have different contact people listed.

**QUESTION 2:** How do I know if I received a letter from the IRS telling me I owe a penalty under ACA?

**ANSWER 2:** Your letter will begin by saying that the IRS has “made a preliminary calculation of the Employer Shared Responsibility payment (ESRP) that you owe.” The letter will probably have a label on the bottom right corner that says “Letter 226J.” It will also include an ESRP Summary Table and Explanation; Form 14764 (“ESRP Response”); and Form 14765 (“Employee Premium Tax Credit (PTC) Listing”).

**QUESTION 3:** What is the first thing I should do if I disagree with the IRS letter?

**ANSWER 3:** The first thing to do is look at the dates in the upper right corner on the first page of the IRS Letter. The “Response Date” is very important. Failure to respond by this date may result in a demand for payment from the IRS and could make it more difficult to challenge the IRS.

**QUESTION 4:** What are the next things I should do if I plan to pay the penalty?

**ANSWER 4:** Just follow the instructions in Letter 226J and include your payment with Form 14764 (You should receive a copy of Form 14764 in your initial letter from the IRS).

**QUESTION 5:** What are the next things I should do if I plan to dispute the penalty?

**ANSWER 5:** Consider whether you will engage someone to assist you in dealing directly with the IRS. Who does your organization typically use to respond to IRS tax-related issues? Likely candidates include a lawyer or accountant who can represent you before the IRS. We are prepared to provide assistance regarding benefit plan information to compile the necessary material for you, or your lawyer or accountant, to respond to the IRS.

- Your first step should be to call the IRS number located on the top of the Form 14764 (included with the Letter 226J) and request additional time to respond.
- Complete and sign Form 14764 and assemble all supporting materials. Your reply must include a signed statement indicating why you object to the penalty, changes you want to make to your reporting forms, and changes to preprinted forms you received along with the IRS Letter 226J.
- Form 14765, Employee PTC Listing – Make changes, if any, on the Employee PTC Listing. Include your revised Employee PTC Listing, if necessary, and any additional documentation supporting your changes with your Form 14764, ESRP Response, and signed statement.
- Get moving. We cannot stress enough that a proper response may require significant effort to prepare. So far, the IRS has not indicated whether they will accommodate requests for additional time to reply. Our advice is to move quickly.
- Make sure the IRS receives your completed package **BY THE RESPONSE DATE INDICATED ON YOUR INITIAL LETTER FROM THE IRS** or any extension granted in response to your request for more time.

**QUESTION 6:** What happens after the IRS receives my timely objections?

**ANSWER 6:** The IRS will respond with a “Letter 227.” Your Letter 227 will describe further actions you must take. Watch for your Letter 227 and continue to pay close attention to any Response Date. If the IRS is planning to continue the dispute, you will have an opportunity to schedule a pre-assessment conference with the IRS Office of Appeals.

*Please be aware that this does not represent legal or tax advice and is only Frenkel's interpretation of the laws, regulations and statutes. It is highly recommended that you seek the advice of your legal and tax professional as to the applicability of this information to your particular situation.*

# IRS Letter 226J Flowchart

## How Did We Get Here?

2015

- §4980H shared responsibility rules (employer mandate) applies to applicable large employers (ALEs) with 100 or more full-time equivalents (FTEs).
- Most ALEs must comply beginning on first day of 2015 plan year.

Early 2016

All applicable large employers (ALEs) with 50 or more FTEs were required to submit 2015 1094s and 1095s to IRS.

Nov 2017

### IRS Begins Sending 226J Letters

Employers can be subject to either a §4980H(a) or a §4980H(b) penalty, but not both.

#### §4980H(a) Penalty

\$173.33/mo. times the total number of full-time employees (not counting the first 80) for each month the employer failed to offer minimum essential coverage to 70% of full-time employees.

#### §4980H(b) Penalty

\$260.00/mo. times the number of full-time employees who receive a premium tax credit when purchasing individual health insurance through a public Marketplace/Exchange.

## Steps Employer Should Take to Respond to Letter 226J

1

Engage entity the employer uses to respond to IRS tax issues such as accounting or law firm.

Agree to IRS Assessment and Pay

Or

Disagree and Respond to IRS



**Important Note:**  
Employer has only 30 days to respond

2

Contact employee benefits consultant or ACA reporting vendor to assist with the collection of benefit plan data necessary to respond to the IRS.

3

Send initial response to IRS by deadline listed in Letter 226J (30 days from date of letter) using IRS Forms 14764 and 14765 (provided by IRS with Letter 226J).

IRS agrees with employer response and reduces or withdraws request for the shared responsibility assessment.

IRS requests more information from employer using Letter 227.

Employer pays assessment or disputes through existing IRS dispute resolution process.

IRS disagrees with employer response and issues a notice and demand for payment letter.