



IRS Now Assessing §4980H Penalties for the 2016 Plan Year

Issue Date: November 2018

The IRS began assessing §4980H (Employer Mandate) penalties late in 2017 by sending Letter 226Js. Letters are being received by applicable large employers who appear to owe a penalty based on the self-reporting submitted via a Form 1094-C and 1095-C. Through September 2018, the letters were tied to proposed assessments for the 2015 calendar year, but now in the last couple of weeks, the IRS has started sending out letters for 2016.

Upon receipt of a Letter 226J, the employer has 30 days to either make payment or appeal the proposed assessment (unless an extension for an additional 30 days is obtained). The Letter 226J is only a proposed assessment, leaving the door open for an employer to appeal and potentially not have to make any payment. However, if the IRS does not receive a timely response to the Letter 226J, the employer will be sent a formal collection letter via a CP220J Notice. Upon receipt of a CP220J Notice, the employer is required to submit payment and then must go through a formal IRS appeal process to get any of the money returned.

Since many of the proposed assessments are the result of a misunderstanding of the offer of coverage requirements and/or employer reporting mistakes, most employers can appeal some or all of the proposed assessment, arguing that coverage was offered in accordance with §4980H requirements. However, keep in mind that with transition relief expiring after the 2015 plan year, employers were required to meet higher standards beginning in 2016 (e.g., coverage must be offered to 95% of full-time employees and their dependent children to avoid a penalty under §4980H(a)), which may leave more employers at risk of incurring bigger penalties.

Last year we worked on appeals for a handful of clients and non-clients in need of support – and in all cases successfully appealed proposed assessments totaling almost \$2.9M that were not reflective of the coverage offered by the employer. In other words, submitting an adequate explanation and supporting documentation results in the IRS's being willing to dismiss or reduce the assessments. Even for those employers who may not have been completely in compliance with §4980H offer of coverage requirements, it is worthwhile to make sure that full-time employees were counted and reported accurately, and that coding on Form 1095-Cs matches the coverage actually offered, to reduce any proposed assessments to the extent possible.

To appeal a proposed assessment under §4980H, we suggest submitting the following:

- A letter/explanation disputing all or part of the assessment;
- A completed Form 14764 indicating disagreement with the assessment and that no payment/partial payment is being sent in; and
- Revised coding on Form 14765 for employees listed, if applicable, along with supporting documentation (e.g., SBC showing minimum value, employee contribution and pay information, proof of waivers).

Generally, within 4–6 weeks after IRS receipt of the employer's appeal to the Letter 226J, the employer will receive a Letter 227K, 227L, or 227M indicating whether the IRS agrees with the appeal. If the IRS agrees with the appeal, no further action is required. If the IRS only partially agrees, or disagrees completely, the employer could choose to appeal again, perhaps providing a more detailed explanation and additional supporting documentation; or the employer could choose to make payment as assessed.

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.