



# Eye On Washington Health Care Reform Update



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## New IRS Guidance on ACA Employer Shared Responsibility Assessments for 2015

On November 2, 2017, new guidance was released by the Internal Revenue Service (IRS) concerning Employer Shared Responsibility assessments under the Affordable Care Act (ACA), also known as the Section 4980H Employer Mandate penalty. Among other things, the guidance indicates that the IRS plans to issue ACA employer assessments in the next few weeks covering tax year 2015. This new guidance from the IRS is significant because it advises that, for the first time, the IRS will be issuing ACA employer assessments since mandatory ACA reporting for Applicable Large Employers (ALEs) began. An ALE is generally an employer that employed an average of at least 50 full-time employees (including full-time-equivalent employees) during the preceding calendar year. Assessments are calculated separately for each employee and each month during which a full-time employee received subsidized ACA coverage. ALEs first filed and furnished Forms 1094-C and 1095-C in early 2016 for the 2015 calendar year.

### Background

As a reminder, an ALE may owe an Employer Shared Responsibility payment for 2015 based on either of two different circumstances: (1) the ALE did not offer health coverage or offered coverage to less than 70 percent of its full-time employees (and their dependents), and at least one of the full-time employees received a premium tax credit to help pay for health coverage through a Marketplace (the 4980H(a) penalty); or (2) the ALE offered coverage to at least 70 percent of its full-time employees (and their dependents), but at least one full-time employee received a premium tax credit to help pay for coverage through a Marketplace, which may occur because the employer did not offer coverage to that particular employee or because the coverage the employer offered that employee was either unaffordable or did not provide minimum value (the 4980H(b) penalty). In 2016 and after, the 70 percent threshold increases to 95 percent. For calendar year 2015, the 4980H(a) penalty amount per applicable employee is \$2,080, and the 4980H(b) penalty amount is \$3,120. For calendar year 2016, the 4980H(a) penalty amount is \$2,160, and the 4980H(b) penalty amount is \$3,240.

For purposes of the ACA's Employer Shared Responsibility provisions, an employee is a full-time employee for a calendar month if he or she averages at least 30 hours of service per week or has 130 hours of service in the month. If no full-time employee receives a premium tax credit, an ALE will not be liable for an Employer Shared Responsibility payment. Several types of transition relief under the Employer Shared Responsibility provisions were available for calendar year 2015. For further details on 2015 transition relief, refer to the IRS website at <https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provision-transition-relief-for-2015-plan-years>.

### New IRS Guidance

New "Frequently Asked Questions" (FAQs) include a statement that "for the 2015 calendar year, the IRS plans to issue Letter 226J informing ALEs of their potential liability for an employer shared responsibility payment, if any, in late 2017." Thus, ALEs should prepare to receive and respond to potential IRS assessments for 2015. ALEs will have 30 days to respond to such notices.



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Letter 226J (the Letter) will include an explanation of Section 4980H, and a summary table itemizing the proposed payment by month. The proposed amounts due are based on information reported to the IRS on Forms 1094-C and 1095-C, and information from the ACA Marketplace/Exchange organizations identifying any full-time employees that were allowed a premium tax credit.

The Letter will be accompanied by Form 14765, "Employee Premium Tax Credit List," which 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.

The Letter will also explain the actions that the employer can take, and will include an Employer Response Form (Form 14764, ESRP Response), which will be due by the response date shown on Letter 226J (generally 30 days from the date of the IRS letter).

## Respond With Details if Necessary

ALEs should respond to Letter 226J if there is any disagreement as to the proposed assessment. For

example, it is possible that some employees listed may actually not have been full-time employees, or may have actually qualified for an affordability safe harbor. The IRS will acknowledge any response to Letter 226J with a Letter 227, and will offer further instructions if the ALE disagrees with the proposed or revised assessment. Employers may request a pre-assessment conference and, following such a conference with the IRS, may also ask the IRS Office of Appeals to review the case.

If the employer does not respond, the IRS will assess the amount of the proposed Employer Shared Responsibility payment shown in the Letter 226J, and will issue a Notice and Demand for Payment (Notice CP 220J). This Notice offers directions and alternatives to pay the assessment.

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>

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