



## IRS Starts to Send ACA Penalty Letters

The IRS has begun notifying employers of their potential liability for failing to provide health coverage compliant with the Affordable Care Act's (ACA's) shared responsibility provisions. It recently released forms that employers can use to dispute the assessment. If you receive a 226J letter, the first step is to notify your third party vendor who may have completed the 1094/1095 filing on your behalf. Fines can range up to 10 million dollars!

The second step is to consult with an experienced ACA attorney, at TEKCare we recommend Alden Bianchi of Mintz Levin in Boston. We will be happy to provide you with the referral.

On Nov. 2, the IRS issued [Q&As 55-58](#), informing employers that by year's end the agency will begin notifying "applicable large employers" (ALEs) of their potential liability for an employer shared responsibility payment, if any, in connection with the 2015 calendar year. The determination will be based on [information that employers reported to the IRS on Forms 1094-C and 1095-C](#) and the individual tax return filed by the ALE's employees. In general, an ALE would be subject to a penalty fee if, for at least one month in the year, one or more of its full-time workers received a premium tax credit through the ACA's Health Insurance Marketplace because the ALE failed to provide ACA-compliant health coverage.

The IRS posted a sample [Letter 226J](#), Preliminary Calculation of the Employer Shared Responsibility Payment, and an [explanation of Letter 226J](#), which describes how ALEs should respond to this letter

*Any ALE that receives a Letter 226J will be provided with 30 days to respond before a demand for payment is made by the IRS- IRS Letter 226J will include*

- [IRS Form 14765](#), Employee Premium Tax Credit Listing, with a list the ALE's assessable full-time employees for the year in question. Only 10 employees will be listed on each page of the Form 14765 so a Staffing Company or ALE member with hundreds of assessable full-time employees should expect a thick package included with the Letter 226J.
- [IRS Form 14764](#), Employer Shared Responsibility Payment Response. Employers receiving Letter 226J should complete, sign, and date the enclosed Form 14764 and return it to the IRS to report any changes they want to make to their Form 1094-C.

### Penalty Refresher

### Basics of the Employer Shared Responsibility / Play or Pay Mandate

The ACA added employer shared responsibility provisions under Section 4980H of

Corporate Office: 818 Shrewsbury Avenue  
Tinton Falls, NJ 07724

Phone: 732-842-6200

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the tax code. ALEs—employers with at least 50 full-time equivalent employees—must offer "minimum essential coverage" that is "affordable" and that provides "minimum value" to their full-time employees or potentially make an employer shared responsibility payment to the IRS.

**All union, part-time, variable hour and seasonal employees are counted to determine the 50 threshold as well as are any affiliated companies as determined by IRC 414 (b), (c), (m) or (o), such an employer is known as an Applicable Large Employer (ALE).**

For plan year 2015, ALEs could face a \$2,000 penalty for every full-time employee in the event there was no valid offer of coverage and a \$3,000 penalty if the offer was not affordable. The penalties are indexed for inflation and rose slightly for each subsequent plan year (2017 and 2018 penalty amounts).

However, "2015 was a phase-in year and an applicable large employer [was defined as having] 100 or more full-time employees," rather than 50 or more, For 2015, ALEs also were "required to offer minimum essential coverage which also met the minimum value standard to at least 70 percent of full-time employees and their eligible dependents," whereas beginning in 2016 the statutory threshold—at least 95 percent of full-time employees—took effect.

Starting in 2015, employers with at least 50 full-time including equivalent employees, on average, in the preceding calendar year, are subject to the Employer Shared Responsibility provision of the Affordable Care Act (ACA). If ALE did not offer at least Minimum Essential Coverage (MEC) or did not offer affordable minimum value coverage to their full-time employees and their dependents to age 26, the employer under 4980 (A), (B) could be subject to a tax assessment if at least one full-time employee receives a premium tax credit from an exchange marketplace. Individuals are eligible for a subsidy if their household income is less than 400% of the Federal Poverty Level, they are not eligible for Medicare or Medicaid, and are not enrolled in the employer's health plan.

Employers who have been counting on the IRS not to enforce the employer shared responsibility payments must be aware that the IRS issued new FAQs on November 2<sup>nd</sup>, 2017 outlining upcoming issuance of penalty demand letters.

**The new guidance explains that:**

- The IRS will notify an employer of potential liability for an employer shared responsibility payment via [Letter 226J](#). The letter will list, by month, the employees who received a premium tax credit and provide the proposed penalty. It will also provide the employer shared responsibility response form (Form 14764) and the name and information for a specific IRS employee to contact with any questions.

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- ALEs will have just 30 days from when the Letter 226J was dated to respond before the IRS demands payment. The ALE's response can either agree with the proposed assessment or disagree in whole or in part.
- The IRS will acknowledge the ALE's response with Letter 227, which describes further actions the employer may need to take.
- If the employer disagrees with the proposed or revised assessment in Letter 227, the employer can request a pre-assessment conference with the IRS Office of Appeals. Conferences will generally take place 30 days from the date of Letter 227.

### Rapid Response Required

If an ALE does not make a timely response to the Letter 226J, "the IRS will demand payment in the proposed amount through notice CP 220J. Assessments are due only after the IRS has provided notice and demand for payment. Regardless of the reason an ALE member receives a Letter 226J, a timely, accurate response is necessary. It would be prudent for any ALE responding to the Letter 226J from the IRS to consult with an attorney who is familiar with the Forms 1094-C and 1095-C as well as other pertinent Affordable Care Act provisions.

*Moving forward, employers should place a heavy emphasis on the accuracy of the Forms 1094-C and 1095-C to avoid potential IRS issues in future years.*

*"In an organization of any size, it might take a week or more for Letter 226J to reach the right department or person,"* said Alden Bianchi, a benefits attorney with Mintz Levin in Boston. "While the Q&A nowhere mentions extensions of time, one would hope that the IRS will be more flexible on this score." Recapped below are Q&A 55-58 from the IRS November 12<sup>th</sup> memo.

### QA 55 - How does an employer know that it owes an employer shared responsibility payment?

According to QA 55, the IRS plans to issue Letter 226J to affected ALEs. The letter will include:

- A summary table itemizing each month an employer may be liable for a payment
- A response form, Form 14764, "ESRP Response"
- Form 14765 which will list by month an ALE's assessable full-time employees
- A description of actions the ALE employer should take to dispute the letter's findings

Letter 226J will include a due date for the employer's response. It will generally be 30 days from the date of the letter. If an employer does not respond or does not respond timely, the IRS will issue a notice and demand for payment, Notice CP 220J.



**QA 56 - Does an employer who receives a Letter 226J proposing an employer shared responsibility payment have an opportunity to respond to the IRS about the proposed payment, including requesting a pre-assessment conference with the IRS Office of Appeals?**

Yes. ALEs 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. Letter 226J will provide instructions for how the ALE should respond in writing, either agreeing with the proposed employer shared responsibility payment or disagreeing with part or all or the proposed amount.

If the ALE responds to Letter 226J, the IRS will acknowledge the ALE's response to Letter 226J with an appropriate version of Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226J and describe further actions the ALE may need to take).

If the ALE does not respond to either Letter 226J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility payment and issue a notice and demand for payment, Notice CP 220J. The IRS allows a 30-day period to respond.

**QA 57 - How does an employer make an employer shared responsibility payment?**  
If, after correspondence with the IRS or a conference with the IRS Office of Appeals, it is determined that ALE is liable for an employer shared responsibility payment, they will issue a notice and demand for payment, Notice CP 220J. Notice CP 220J will include a summary of the payment. For payment options, such as entering into an installment agreement, refer to [Publication 594](#), The IRS Collection Process. The general steps from billing to collection are outlined below:

1. If you owe taxes, the IRS will send you a bill. This is your first bill for tax due. Based on your return, we will calculate how much tax you owe, plus any interest and penalties.
2. If you don't pay your first bill, we will send you at least one more bill. Remember, interest and penalties continue to accrue until you've paid your full amount due.
3. If you still don't pay after you receive your final bill, we will begin collection actions. Collection actions can range from applying your subsequent tax year refunds to tax due (until paid in full) to seizing your property and assets.

**QA 58 - When does the IRS plan to begin notifying employers of potential employer shared responsibility payments?**

For the 2015 calendar year, the IRS will begin to issue Letter 226J informing ALEs of their potential liability in late 2017.