



IRS Updates Guidance on Play-or-Pay Penalty Assessments

Beginning in 2015, to comply with the Patient Protection and Affordable Care Act (ACA), “large” employers must offer their full-time employees health coverage, or pay one of two employer shared responsibility / play-or-pay penalties. The Internal Revenue Service (IRS) determines the penalty each calendar year after employees have filed their federal tax returns.

In November 2017, the IRS indicated on its [“Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act” webpage](#) that, in late 2017, it plans to issue [Letter 226J](#) to inform large employers of their potential liability for an employer shared responsibility payment for the 2015 calendar year.

The IRS’ determination of an employer’s liability and potential payment is based on information reported to the IRS on Forms 1094-C and 1095-C and information about the employer’s full-time employees that were received the premium tax credit.

The IRS will issue Letter 226J if it determines that, for at least one month in the year, one or more of a large employer’s full-time employees 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).

Letter 226J will include:

- A brief explanation of Section 4980H, the employer shared responsibility regulations
- An employer shared responsibility payment summary table that includes a monthly itemization of the proposed payment and whether the liability falls under Section 4980H(a) (the “A” or “No Offer” Penalty) or Section 4980H(b) (the “B” or “Inadequate Coverage” Penalty) or neither section
- A payment summary table explanation
- An employer shared responsibility response form ([Form 14764](#) “ESRP Response”)
- An employee premium tax credit list ([Form 14765](#) “Employee Premium Tax Credit (PTC) List”) which lists, by month, the employer’s assessable full-time employees and the indicator codes, if any, the employer reported on lines 14 and 16 of each assessable full-time employee’s Form 1095-C
- Actions the employer should take if it agrees or disagrees with Letter 226J’s proposed employer shared responsibility payment
- Actions the IRS will take if the employer does not timely respond to Letter 226J

- The date by which the employer should respond to Letter 226J, which will generally be 30 days from the date of the letter
- The name and contact information of the IRS employee to contact with questions about the letter

If an employer responds to Letter 226J, then the IRS will acknowledge the response with Letter 227 to describe further actions that the employer can take.

After receiving Letter 227, if the employer disagrees with the proposed or revised shared employer responsibility payment, the employer may request a pre-assessment conference with the IRS Office of Appeals. The employer must request the conference by the response date listed within Letter 227, which will be generally 30 days from the date of the letter.

If the employer does not respond to either Letter 226J or Letter 227, then the IRS will assess the proposed employer shared responsibility payment amount and issue a notice and demand for payment on Notice CP 220J.

Notice CP 220J will include a summary of the employer shared responsibility payment, payments made, credits applied, and the balance due, if any. If a balance is due, Notice CP 220J will instruct an employer how to make payment. For payment options, such as an installment agreement, employers should refer to [Publication 594 "The IRS Collection Process."](#)

Employers are not required to make payment before receiving a notice and demand for payment.

The ACA prohibits employers from making an adverse employment action against an employee because the employee received a tax credit or subsidy. To avoid allegations of retaliation, as a best practice, employers who receive a Letter 226J should separate their employer shared responsibility penalty assessment correspondence from their human resources department and employees who have authority to make employment actions.

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