

WHAT YOU NEED TO KNOW



Understanding Your Client's IRS Play-or-Pay Penalty Assessment Letter

Recently, you may have received a call from your client regarding a letter received from the Internal Revenue Service (IRS) stating that your client may owe money because it either didn't offer health coverage to enough of its full-time employees, or the health coverage that it offered wasn't affordable or minimum value.

Here are answers to common questions that your client may ask.

What is this Letter 226-J?

[Letter 226J](#) is a proposed penalty assessment letter that IRS began sending to large employers in late 2017.

Why did I get a Letter 226-J?

If your company was a large employer that was required to offer health coverage to your full-time employees in calendar year 2015, then the IRS has reviewed your Form 1094/1095-C filings for that year and determined that your company may owe money based on the information that you provided in the forms.

The letter will explain why the IRS proposes that you owe a penalty. Generally, for 2015, as a large employer you may owe a penalty under the employer shared responsibility provisions (ESRP) of the Patient Protection and Affordable Care Act (ACA) if you either:

- 1) didn't offer minimum essential coverage (MEC) to at least 70 percent of your full-time employees (and their dependents) and at least one of your full-time employees received a premium tax credit (or subsidy) on the Marketplace exchange; or
- 2) offered MEC to at least 70 percent of your full-time employees (and their dependents), but at least one of your full-time employees received a subsidy on the Marketplace exchange because the coverage was either unaffordable or didn't provide minimum value.

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What should I do first?

You should contact your attorney so you can file your response with the IRS by the deadline in the letter. Generally, you'll find the deadline on the first page of the letter. It's the firm date listed next to "Response date." The letter will also contain Form 14764 (ESRP Response) which is the form that you'll use to file your response with the IRS.

What should I do after I contact my attorney?

You should contact the people (for example, CPA or vendor) that prepared your Form 1094/1095-C filings for calendar year 2015. You should ask them to provide you with a copy of your filings for that year. If there are specific questions about coding on the past forms, then you should ask them to explain why they used certain codes.

What should I do to prepare my response to the IRS?

Unless your attorney advises differently, you should locate the relevant written offers of coverage and signed waivers of coverage. The signed waiver of coverage is especially useful if it shows that the coverage provided minimum value and was offered at a cost that was affordable to the employee using an affordability safe harbor.

You should also locate your plan document and summary plan description that describe the measurement method that you used. If you used a look-back measurement method, then you should locate the document that details the dates and time periods used.

What shouldn't I do?

Unless otherwise instructed by your attorney, do not make payment at the initial stage of receiving this first letter from the IRS. Letter 226-J is a proposed penalty assessment letter, not a notice and demand for payment.

Do not ignore the response deadline. If you do not respond to Letter 226-J (or IRS' Letter 227, which is the IRS' response to an employer's response to Letter 226-J), then the IRS will assess the payment amount against you by sending Notice CP220J to you. Notice CP220J is the IRS' payment demand that provides an employer with payment instructions.

Do not take any adverse employment action against the employees who received a subsidy. The ACA prohibits employers from retaliating against employees who received a subsidy. To avoid retaliation allegations, do not have your human resources department (or employees who have authority to make employment actions) handle Letter 226-J correspondence.

What is Form 14764?

Employers must use [Form 14764](#) to respond to the Letter 226-J, to either indicate that they agree or disagree with the letter. Employers who disagree with the proposed liability must provide a full explanation of their disagreement with [Form 14765](#).

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Conclusion

If your client receives a letter from the IRS regarding proposed play-or-pay penalties, then the best approach is to urge your client to consult with its attorney as soon as possible. Although you may provide some educational information about the letter, it's ultimately the employer's responsibility to file its reply to the IRS by completing Form 14764 within the IRS' deadline.

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