



Employee Benefits & Executive Compensation ADVISORY ■

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The Taxman Cometh: IRS Begins Assessing Employer Mandate Penalties

The IRS has finally started to enforce the employer shared responsibility requirement (the “employer mandate”) in the Affordable Care Act, and is mailing notices now to employers who may owe a penalty for 2015. Because of data quality issues, many employers will be assessed amounts they do not owe. However, employers have only 30 days to appeal the assessment, and because of the timing of the notices, and the manner in which they are addressed, it is likely that many notices will not reach the right individuals in time for employers to respond. Your first challenge in appealing an assessment is receiving the notice in the first place.

Dealing with the IRS can be daunting in any situation, but it may be especially so here in light of the rocky rollout of the employer mandate reporting on which the assessments are based and the quick and quiet manner in which the IRS rolled out the assessment process. Most of our clients consist of a parent company with a benefits / HR department, and numerous subsidiaries that rely on the parent for this type of function. The IRS notices will typically be mailed to the subsidiaries, naming only the company as addressee, and not necessarily addressed to any specific individual or even to a department.

Some of our clients have received assessments exceeding \$200,000. We want you to be prepared in the event a notice arrives at your company or an affiliated company. Here are the things you need to know to start preparing:

- The notice of assessments come in the form of a “[Letter 226j](#).” It will come from the Department of the Treasury, Internal Revenue Service, and will start by saying, “We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.”
- **You will have only 30 days to respond.** Thus, your mail rooms should be on the lookout for the form and know where to route it. It will arguably be addressed to the contact identified on the 1094-C you filed, but the history surrounding the employer mandate reporting suggests there are no guarantees of that. You should alert the mail rooms for letters from “The Department of Treasury, Internal Revenue Service.” There is a specific response process prescribed by the IRS, but the requirements regarding an extension of time to respond have yet to be provided.

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- Since each subsidiary of an applicable large employer was required to file its own 1094-C and 1095-Cs with the IRS, employers wishing to coordinate the response to the IRS should also alert the subsidiaries (and their mail rooms) that a notice may be coming.
- The assessments may not be correct. There are any number of reasons that an employee may have received a subsidy and triggered an employer penalty notice, even when all of the requirements for a penalty have not been met.
- An applicable large employer may be subject to an employer mandate penalty for a month if a full-time employee receives a subsidy that month for coverage purchased on an Exchange. Employees will only qualify for a subsidy on an exchange if, among other things, they are not eligible for affordable, minimum value coverage from their employer. However, due to deficiencies in the process of collecting data, some employees may have received subsidies for which they did not qualify, and even if an employee did qualify for the subsidy, the employer may be exempt from the penalty for other reasons. The standard for determining the affordability of coverage, for example, is different from the perspective of the employee and the employer.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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