

HEALTH & WELFARE PLAN LUNCH GROUP

December 7, 2017

ALSTON & BIRD LLP

One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7885
E-mail: john.hickman@alston.com

© 2017 All Rights Reserved

INDEX

1. IRS QSEHRA Guidance Leaves Many “Gotchas” for the Unwary Small Employer
2. *A&B Advisory* (November 27, 2017): The Taxman Cometh: IRS Begins Assessing Employer Mandate Penalties
3. Employer Shared Responsibility Payment

IRS QSEHRA Guidance Leaves Many “Gotchas” for the Unwary Small Employer

© 2017 By John R. Hickman, Esq., Carolyn Smith, Esq. Steven Mindy, Esq. and Ashley Gillihan, Esq., Alston & Bird, LLP

At the end of 2016, Congress included a provision allowing certain small employers an opportunity to help employees purchase individual market major medical coverage and pay for other medical expenses through tax-favored health reimbursement arrangements. The new health reimbursement arrangement vehicle, called a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA), has significant limitations under current tax provisions, and may not be appropriate for all small employers. Recently, the IRS issued comprehensive Q&A guidance addressing many of the compliance issues affecting QSEHRAs in the form of IRS Notice 2017-67.¹ We cover that guidance, as well as some of the more significant QSEHRA compliance requirements below.

Top 10 QSEHRA Compliance Traps for Small Employers.

Several significant legal and practical limitations and potentially significant penalties may arise for unwary small employers considering adopting a QSEHRA arrangement. For example, QSEHRAs are only available to employers that are not subject to the Affordable Care Act (ACA) employer responsibility penalties – i.e., employers that have less than 50 full-time and full-time equivalent employees and thus are not applicable large employers (ALEs). In addition, while many small employers are likely to find QSEHRAs attractive, there are some features that should be looked at carefully before deciding to move forward. These include a requirement that a QSEHRA can only be funded through direct employer contributions (meaning that no employee salary reduction contributions are permitted), nondiscrimination rules, and a provision prohibiting employers from maintaining another group health plan.

The top compliance concerns for an employer considering adopting a QSEHRA include:

1. The employer must generally have fewer than 50 full time employees (including FT equivalencies) counting employees of controlled group members. Stated differently, the employer must not be an applicable large employer (Non-ALE).
2. The employer (including controlled group members) cannot offer, sponsor, or endorse any other group health plan coverage including medical, vision, dental, or supplemental health indemnity (e.g., cancer, hospital indemnity, etc.) coverage.
3. The employer cannot pay for or endorse (to the point of being an ERISA covered benefit) any individual health or medical insurance benefit.
4. The employer must fund the QSEHRA with real employer contributions (not salary reductions) – meaning that the employer must actually pay for the cost of

¹ IRS Notice 2017-67, <https://www.irs.gov/pub/irs-drop/n-17-67.pdf>

individual medical coverage; any additional employee contributions must be on an after-tax basis.

5. All full time employees must be provided the same QSEHRA benefit to satisfy applicable nondiscrimination requirements
6. The employer is required to have the employee substantiate: i) that all QSEHRA participants (including dependents for whom a reimbursement is paid) have minimum essential coverage (MEC) either through the QSEHRA purchased policy or another source; and ii) that an eligible medical expense was incurred for any reimbursements through the QSEHRA to be tax free.
7. Additional tax (PCORI fee) and reporting (W-2 reporting of QSEHRA benefit) is required as well as a new notice describing the QSEHRA benefit.
8. The employer must adopt and maintain a QSEHRA qualified HRA plan document.
9. If there is any outside administration of the QSEHRA arrangement, or if the QSEHRA has more than 50 participants (e.g., due to participation by part-time employees), the employer must comply with HIPAA's privacy and security requirements, which include adoption and maintenance of HIPAA privacy and security policies and procedures.
10. State law should be checked to ensure that employer participation with individual medical policy coverage is permissible. Some states consider individual health insurance paid for by employers to be group health insurance. Thus, insurers, brokers and agents working with small employers should carefully consider state-law implications, which might include prohibitions against marketing individual policies to small employers. Some states specifically prohibit *employers* from reimbursing individual premiums.

Why QSEHRAs?

The QSEHRA provision is designed to overrule agency guidance under the ACA prohibiting employer arrangements that seek to pay or reimburse the cost of individual market major medical insurance purchased by employees. This guidance specifically provides that stand-alone health reimbursement arrangements (HRAs), meaning HRAs that are not integrated with another ACA compliant group health plan, are not permitted.² While these restrictions are not clear from the statutory provisions of the ACA, regulations and other administrative guidance preclude this type of arrangement on the basis that they violate one or more ACA requirements applicable to group health plans, in particular, preventive care requirements and/or the prohibition on annual and lifetime dollar limits on essential health benefits.

² The agency guidance prohibits pre-tax salary reduction and most other forms of employer reimbursement of individual major medical insurance. Other than as specifically allowed for QSEHRAs, this prior agency guidance continues to prohibit such "employer payment plan" arrangements.

The federal tri-agencies (Department of Labor, Department of Health and Human Services, and Internal Revenue Service/Department of the Treasury) use the broad term “employer payment plan” to encompass the types of arrangements prohibited under this guidance. In some cases, even post-tax reimbursement of individual market major medical insurance is not permitted, depending upon the level of employer involvement in the arrangement. Prior to enactment of the Cures Act, employers that adopted these types of arrangements were subject to a \$100 per person per day excise tax under Internal Revenue Code § 4980D (for private employers and churches) or a \$100 per day penalty under Public Health Service Act § 2723 (for governmental employers).

The Cures Act allows small employers to adopt this type of HRA arrangement, provided the requirements in the Cures Act are followed. QSEHRAs are not subject to the ACA market reforms and are not subject to COBRA requirements.

Eligible Employers

An employer is eligible to adopt a QSEHRA if *both* the following requirements are met:

- (1) The employer is not an applicable large employer (ALE) as defined under the ACA employer responsibility penalties under tax code § 4980H. Under 4980H, ALE status is determined on a controlled group basis, so that for an employer to be eligible for a QSEHRA, the entire controlled group must collectively employ less than 50 full-time and full-time equivalent employees *in the prior calendar* year.
- (2) The employer (and any controlled group member) does not maintain a “group health plan” for any employees.

The Cures Act does not specifically define “group health plan” for purposes of the requirement that a small employer adopting a QSEHRA cannot offer a group health plan to any employee. The definition of group health plan in the tax code is fairly broad and includes more than just major medical coverage. Unfortunately, the IRS FAQ guidance uses this very broad definition of health plan for QSEHRAs, meaning that ***ABSOLUTELY NO other health coverage can be sponsored or endorsed by the employer or any controlled group member of the employer.*** For example, health flexible spending arrangements (FSAs) and supplemental benefits such as dental and vision plans are considered group health plans for some purposes (e.g., COBRA). Employer involvement with such coverage would invalidate the QSEHRA arrangement. Additional examples provide that employer contributions to an HSA may be permissible, but that employers cannot recommend or endorse any group health coverage to the extent that such endorsement may cause the coverage to be considered an ERISA covered plan.³

Permitted Contributions

³ See Notice 2017-67, FAQs 1-7 and 55.

Salary reduction contributions to a QSEHRA are not permitted. Thus, a QSEHRA must be funded solely by the employer. Moreover, as discussed below, the prior agency guidance continues to prohibit employees from paying any additional cost of the individual major medical coverage on a pre-tax basis. While employees may apparently pay any additional contributions through after tax payroll deductions, care must be taken to ensure that the employer is not considered to sponsor or endorse any specific health insurance carrier, policy, or form.⁴

Nondiscrimination Requirements

In general, a QSEHRA must be provided on the same terms to all eligible employees. Theoretically, the employer can vary the amount of reimbursements available under the arrangement based on age of the eligible employee (and family members if the arrangement covers family members) or the number of family members of the employee covered under the arrangement. However, any such variation must be made in accordance with the variation in price of an insurance policy in the relevant individual health insurance market. For this purpose, any variation must be determined by reference to the same insurance policy with respect to all eligible employees. Due to the administrative complexity of such a process (especially where, as noted above, a single carrier cannot be required), most employers will choose to provide a flat amount of QSEHRA benefit.

“Eligible employee” means any employee of the employer. However, a QSEHRA may exclude the following employees (as set forth in regulations applicable to self-funded health plans under Section 105 of the Code):

- Employees who have not completed 90 days of service;⁵
- Employees who have not attained age 25;
- Part-time or seasonal employees;
- Employees covered by a collective bargaining agreement; and
- Nonresident aliens who receive no earned income from the employer from sources within the United States.

Once an employee falls outside of one of the excludable categories (above), they must be provided coverage under the QSEHRA no later than the day following the day they cease to fall in one of the excludable categories above. Moreover, employees cannot waive participation in a QSEHRA (e.g., to preserve HSA eligibility) because the Cures Act requires that the QSEHRA be “provided” to all eligible employees.⁶ This could cause individuals who would like to make HSA contributions to be ineligible if their employer provides a QSEHRA that allows for reimbursement of more than medical coverage premiums (e.g., it reimburses out of pocket medical expenses).⁷

Maximum Benefit Requirement

⁴ See Notice 2017-67, FAQ 55.

⁵ Solely for QSEHRAs, the Cures Act reduces the Code Section 105 requirement from 3 years to 90 days.

⁶ See Notice 2017-67, FAQs 8-11.

⁷ See Notice 2017-67, FAQs 75.

The maximum amount currently available under a QSEHRA for any calendar year cannot exceed \$5,050 (\$10,250 if the arrangement provides for payments for medical care for family members). The dollar amounts are indexed in \$50 increments for inflation, based on changes in the Consumer Price Index for All Urban Consumers (the same index used for purposes of determining rate brackets under the income tax rules). Updated amounts will generally be available in October of each year. The maximum dollar amounts are determined on a month to month basis (using current and proceeding year statutory limits) if a QSEHRA is offered on a non-calendar year basis and are pro-rated to reflect the number of months that the QSEHRA is provided if an employee is covered under the arrangement for less than a full year. A QSEHRA may allow the full year's benefit amount to be reimbursed at the time a claim is incurred, but any reimbursement for claims provided after termination must be prorated by the number of months of coverage (even if the claims were incurred prior to termination of coverage). While carryovers for unused benefits are allowed under the nondiscrimination requirement, any carryover amount when added to the current year's benefit must not exceed the statutory limits.⁸

Proof of "MEC Coverage" Requirement

Part of the definition of a QSEHRA is that the arrangement provides for the payment or reimbursement of medical expenses as defined under tax code § 213(d) "after the employee provides proof of coverage." While the term "coverage" is not defined for this purpose, the IRS has interpreted it to mean that each individual (including dependents) for whom an expense is reimbursed must have minimum essential (MEC) coverage (either through the QSEHRA or another plan). The "MEC substantiation" can be accomplished by obtaining: i) proof of third party coverage (e.g., an insurance card or EOB) and an attestation as to MEC; or ii) an attestation as to such coverage from the employee stating that the employee and individual have MEC, the date such coverage began, and the provider of coverage. For subsequent months, the attestation can be built into any reimbursement claim form or process.⁹

Tax Treatment of Reimbursements

Reimbursements are tax-free to the employee if the employee has MEC for the month in which the expense is incurred. MEC is defined under the ACA rules under tax code § 5000A(f). The QSEHRA itself is not MEC, so the employee must have some other type of coverage (e.g., in many cases, the individual major medical coverage they are purchasing) to qualify for tax-exempt treatment. The language does not restrict MEC to any particular type of coverage and thus, for example, would appear to include individual market coverage whether purchased on or off the Marketplace, group health plan coverage through another employer, and Medicare.

Once eligible, a QSEHRA can reimburse expenses for medical care as defined under tax code 213(d). Thus, reimbursement of individual major medical health insurance premiums, as well as other § 213(d) expenses, is permitted. Premiums paid by the

⁸ See Notice 2017-67, FAQs 27 – 34.

⁹ See Notice 2017-67, FAQs 41 – 43.

employee on a pre-tax basis for coverage under a group health plan of another employer (e.g., the spouse's employer) would not qualify for tax-free treatment, but may be permitted to be reimbursed under a QSEHRA.¹⁰ Additionally, a QSEHRA can reimburse over-the-counter drugs purchased without a prescription, but the reimbursements must be taxed due to the restrictions under Code § 106(f).¹¹

In order for a reimbursement to be tax free, the employer must substantiate that the expense has been incurred, using methods similar to those allowed for reimbursing expenses under a cafeteria plan FSA or an HRA. Failure to require adequate substantiation (e.g., a third party receipt and statement from the participant) and/or seek repayment of erroneous reimbursements prior to March 15th of the year following the year in which the error is identified could result in all reimbursements under the QSEHRA being taxed.¹²

Notice, Reporting, and Substantiation Requirements

Employers are required to notify eligible employees of a QSEHRA 90 days before the beginning of the plan year of the QSEHRA (or February 19, 2018 if later). For newly eligible employees, the notice must be sent prior to the first day the employee becomes eligible for a QSEHRA. The notice can be sent in writing or using the IRS approved e-Sign procedure. The notice must include the amount of the benefit under the QSEHRA, a statement that the employee must inform the exchange as to the amount of the QSEHRA benefit and impact on the premium tax credit, and also inform the employee that payments may be taxable if the employee does not have MEC. The IRS guidance includes a sample notice as an appendix.¹³

Employers are required to include the total amount of any permitted QSEHRA benefit on W-2 in Box 12 using Code "FF". The IRS has indicated that the amount(s) to be reported for W-2 reporting purposes will generally correspond to the amount of reimbursement available regardless of the amount actually reimbursed during the year. In a series of FAQ examples, the IRS guidance clarifies issues related to pro-rated years, carryover benefits, and coverage valuation.¹⁴

Consequences for Failing to Meet QSEHRA Requirements

The requirement that QSEHRAs be funded by the employer (with no salary reduction contributions), the nondiscrimination rules, and the proof of coverage provision are all part of the definition of a QSEHRA. An arrangement that does not satisfy these requirements is not a QSEHRA and will be subject to the ACA market reforms and other requirements applicable to group health plans. Thus, an employer that fails to meet the applicable requirements could be subject to the \$100 per person per day excise tax or penalty (as applicable).

¹⁰ See Notice 2017-67, FAQs 48 and 63.

¹¹ See Notice 2017-67, FAQs 54 and 63.

¹² See Notice 2017-67, FAQs 44-45.

¹³ See Notice 2017-67, FAQs 35-39.

¹⁴ IRS Notice 2017-67, Q/A 57 – 64.

Coordination with ACA Premium Tax Credits

There is a special rule for coordinating QSEHRAs with eligibility for premium tax subsidies. An employee who is provided a QSEHRA is not eligible for a premium tax credit if the QSEHRA is “affordable.” Affordability for this purpose is computed by looking at the self-only QSEHRA benefit in a manner similar for other employer coverage – i.e., looking to the amount of self-only permitted QSEHRA benefit made available, regardless of the amount paid.¹⁵

The QSEHRA is considered affordable for a month if excess of the self-only premium under the second lowest cost silver plan offered in the relevant individual health insurance market over 1/12 of the employee’s permitted benefit under the QSEHRA does not exceed 1/12 of 9.5 (as adjusted for inflation) percent of the employee’s household income.

If QSEHRA coverage does not meet the affordability standard, then the monthly premium tax credit is reduced by 1/12 of the annual benefit actually provided (e.g., self only or family as applicable) under the QSEHRA.

Cadillac Plan Tax

Benefits under a QSEHRA are taken into account for purposes of the so-called Cadillac plan tax under tax code § 4980I, currently scheduled to go into effect in 2020. For Cadillac plan tax purposes, the value of the coverage under a QSEHRA is the maximum amount of permitted benefit available under the arrangement to the employee and not the specific amounts reimbursed.

Even though QSEHRAs are subject to the Cadillac tax, it seems unlikely that the tax would apply with respect to such arrangements, assuming that the tax does go into effect. This is for two reasons. First, the maximum permitted benefit is significantly less than the Cadillac plan tax thresholds, which are \$10,200 for single coverage and \$27,500 for family coverage. These are the amounts that would apply in 2018; the thresholds will be higher in 2020 and are indexed in subsequent years. In addition, because QSEHRAs are available only to employers that do not have another group health plan (other than possibly certain types of supplemental coverage), no other coverage of that employer is likely to push the value over the threshold.

Patient-Centered Outcomes Research Trust Fund (PCOR) Fee

Small employers who sponsor QSEHRAs must also file Form 720 and pay the Patient-Centered Outcomes Research Trust Fund fee under Code § 4376 for plan years that end before October 1, 2019. The Form 720 is due on July 31 of the year following the last day of the plan year. The fee for plan years ending before October 1, 2018 is \$2.38 per the average number of covered lives under the plan.¹⁶

¹⁵ IRS Notice 2017-67, Q/A 65 – 71.

¹⁶ IRS Notice 2017-67, Q/A 74.



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 27, 2017

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.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

- 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.

You can subscribe to future ***Employee Benefits & Executive Compensation*** advisories and other Alston & Bird publications by completing our [publications subscription form](#).

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

Members of Alston & Bird's Employee Benefits & Executive Compensation Group

Robert A. Bauman
202.239.3366
bob.bauman@alston.com

David R. Godofsky
202.239.3392
david.godofsky@alston.com

Blake Calvin MacKay
404.881.4982
blake.mackay@alston.com

John B. Shannon
404.881.7466
john.shannon@alston.com

Saul Ben-Meyer
212.210.9545
saul.ben-meyer@alston.com

John R. Hickman
404.881.7885
john.hickman@alston.com

Steven Mindy
202.239.3816
steven.mindy@alston.com

Carolyn E. Smith
202.239.3566
carolyn.smith@alston.com

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

David Mohl
202.239.3389
david.mohl@alston.com

Michael L. Stevens
404.881.7970
mike.stevens@alston.com

Dominic DeMatties
202.239.3011
dominic.dematties@alston.com

Emily C. Hootkins
404.881.4601
emily.hootkins@alston.com

Earl Pomeroy
202.239.3835
earl.pomeroy@alston.com

Daniel G. Taylor
404.881.7567
dan.taylor@alston.com

Patrick C. DiCarlo
404.881.4512
pat.dicarlo@alston.com

James S. Hutchinson
212.210.9552
jamie.hutchinson@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Kerry T. Wenzel
404.881.4983
kerry.wenzel@alston.com

Meredith Gage
404.881.7953
meredith.gage@alston.com

Edward T. Kang
202.239.3728
edward.kang@alston.com

Syed Fahad Saghir
202.239.3220
fahad.saghir@alston.com

Kyle R. Woods
404.881.7525
kyle.woods@alston.com

Ashley Gillihan
404.881.7390
ashley.gillihan@alston.com

Jahnisa Tate Loadholt
202.239.3670
jahnisa.loadholt@alston.com

Thomas G. Schendt
202.239.3330
thomas.schendt@alston.com



ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2017

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333



Department of the Treasury
Internal Revenue Service
Group 2219
7300 Turfway Road, Suite
410 Florence, KY 41042

Tax year:

Letter date:

Employer ID number:

Contact name:

Contact ID number:

Contact telephone number:

Contact e-fax number:

Response date:

Dear

We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe. **Proposed ESRP \$ [XXXXXX]**

Our records show that you filed one or more Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS. Our records also show that for one or more months of the year at least one of the full-time employees you identified on Form 1095-C was allowed the premium tax credit (PTC) on his or her individual income tax return filed with the IRS. Based on this information, we are proposing that you owe an ESRP for one or more months of the year.

You generally owe an ESRP for a month if either:

- You did not offer minimum essential coverage (MEC) to at least []% of your full-time employees (and their dependents) and at least one of your full-time employees was certified as being allowed the PTC; or

Letter 226J (10-2017)
Catalog Number 67905G

- You offered MEC to at least [] % of your full-time employees (and their dependents), but at least one of your full-time employees was certified as being allowed the PTC (because the coverage was unaffordable or did not provide minimum value, or the full-time employee was not offered coverage).

This letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of your full-time employees was enrolled in a qualified health plan for which a PTC was allowed. Based on this certification and information contained in our records, we are proposing that you owe an ESRP of \$[].

What you must do

Review this letter carefully. It explains the proposed ESRP and what you should do if you agree or disagree with this proposal. You must tell us whether you agree or disagree with the proposed ESRP by the Response date on the first page of this letter.

The following items are included:

- An explanation of the employer shared responsibility provisions in Internal Revenue Code (IRC) Section 4980H, which are the basis for the ESRP. See **About the ESRP**;
- An **ESRP Summary Table** itemizing your proposed ESRP by month;
- An **Explanation of the ESRP Summary Table**;
- Form 14764, **ESRP Response**; and
- Form 14765, **Employee Premium Tax Credit (PTC) Listing (Employee PTC Listing)**

It will be useful to have the Form(s) 1094-C and 1095-C that you filed with the IRS for the tax year shown on the first page of this letter available when you review this letter.

If you agree with the proposed ESRP

- Complete, sign, and date the enclosed Form 14764, ESRP Response, and return it to us by the Response date on the first page of this letter.
- Include your payment of \$[XXXXXX]. If you're enrolled in the Electronic Federal Tax Payment System (EFTPS), you can pay electronically instead of by check or money order.
- If you don't pay the entire agreed-upon ESRP, you will receive a Notice and Demand (your "bill") for the balance due. For additional payment options, refer to Publication 594, The IRS Collection Process, or call the telephone number on your bill. We will begin the collection process if you do not make payment in full and on time after you receive your bill.

If you disagree with the proposed ESRP

- Complete, sign, and date the enclosed Form 14764, ESRP Response, and send it to us so we receive it by the Response date on the first page of this letter.
 - Include a signed statement explaining why you disagree with part or all of the proposed ESRP. You may include documentation supporting your statement.
 - Make sure your statement describes changes, if any, you want to make to the information reported on your Form(s) 1094-C or Forms 1095-C. Do not file a corrected Form 1094-C with the IRS to report any changes you want to make to your Form 1094-C filed for the tax year shown on the first page of this letter.

- Make changes, if any, on the **Employee PTC Listing** using the indicator codes in the Instructions for Forms 1094-C and 1095-C for the tax year shown on the first page of this letter. Do not file corrected Forms 1095-C with the IRS to report requested changes to the Employee PTC Listing; and
- Include your revised Employee PTC Listing, if necessary, and any additional documentation supporting your changes with your Form 14764, ESRP Response, and signed statement.

About the Form 14765, Employee PTC Listing

The Employee PTC Listing shows the name and truncated social security number of each full-time employee for whom you filed a Form 1095-C if:

- The employee was allowed a PTC on his or her individual income tax return for one or more months of the tax year shown on the first page of this letter; and
- You did not report an affordability safe harbor or other relief from the ESRP on the employee's Form 1095-C for one or more of the months the employee was allowed a PTC.

These employees are referred to as assessable full-time employees.

Each monthly box on the Employee PTC Listing has two rows. The first row reflects the codes, if any, that were entered on line 14 and line 16 of the employee's Form 1095-C for each month. For each employee, if the month is **not highlighted**, the employee is an assessable full-time employee for that month. If the month is highlighted, the employee is not an assessable full-time employee for that month.

Employees who are not considered assessable full-time employees **for all twelve** months of the year (either because the employee was not allowed a PTC for any month in the calendar year or a safe harbor or other provision providing relief was reported on Form 1095-C for each month the employee was allowed a PTC) are not included on the Employee PTC Listing.

Specific instructions for making changes to the Employee PTC Listing

- If the information reported on an assessable full-time employee's Form 1095-C was inaccurate or incomplete, you may make changes to the Employee PTC Listing using the applicable indicator codes for lines 14 and 16 that are described in the Instructions for Forms 1094-C and 1095-C. Make any changes, for each employee, as necessary, by entering new codes on the 2nd row of each monthly box.
- When making changes, first enter the indicator code for line 14 and then enter the indicator code for line 16. Separate the two codes with a slash (e.g., 1H/2A).
- If the same indicator code applies for all 12 months of the calendar year, enter that code in the "All 12 Months" column, and do not make entries for any of the months.
- If you are providing additional information about the changes for an employee, enter a check in the column titled "Additional Information Attached." Otherwise, leave this column blank.

NOTE: If more than one indicator code could apply for a month, enter only one code for that month on the Employee PTC Listing. Note any additional indicator codes that could apply for the affected employee in your signed statement. Include the employee's name, the applicable months and the additional indicator codes for each month.

We will review what you submit and will contact you.

Please ensure the signed statement and all documents submitted include the tax year and your employer ID number in the top right corner.

If we don't hear from you

If you don't respond by the Response date on the first page of this letter, we will send you a Notice and Demand for the ESRP that we proposed and assessed. The ESRP will be subject to IRS lien and levy enforcement actions. Interest will accrue from the date of the Notice and Demand and continue until you pay the total ESRP balance due.

About the ESRP

The ESRP rules only apply to an employer that is an applicable large employer (ALE). In general, an employer is an ALE for a year if it had an average of 50 or more full-time employees (including full-time equivalent employees) during the preceding calendar year.

The ESRP applies and is calculated on a monthly basis. Each month is a taxable period. An ALE may be liable for an ESRP for any month under either IRC Section 4980H (a) or (b) if it:

- **Did not offer** MEC to at least []% of its full-time employees (and their dependents) and at least one full-time employee was allowed the PTC (**IRC Section 4980H(a)**); or
- **Did offer** MEC to at least [] % of its full-time employees (and their dependents), and at least one full-time employee was allowed the PTC (because the coverage was unaffordable or did not provide minimum value, or the full-time employee was not offered coverage) (**IRC Section 4980H(b)**).

The ESRP is not deductible for income tax purposes.

Our authority for proposing the ESRP is IRC Section 4980H. For more information about IRC Section 4980H, including definitions of key terms, such as full-time employee, how to determine ALE status and whether the ALE has made an offer of coverage visit the ACA Information Center for Applicable Large Employers (ALEs) at www.irs.gov, keyword "ALEs." In addition, for information about completing Forms 1094-C and 1095-C and available transition relief, see the Instructions for Forms 1094-C and 1095-C for the tax year shown at the top of the page. You can find prior year Instructions at www.irs.gov (at the top of the screen select "Forms and Pubs," under the "Browse" heading choose "List of Prior Year Forms & Pubs" and in the "Find" box enter "1094-C" or "1095-C").

ESRP Summary Table

	Information Reported to IRS						
Month	a. Form 1094-C, Part III, Col (a) Minimum essential coverage offer indicator offered to at least [70% or 95%]	b. Form 1094-C, Part III, Col (b) Full-time employee count for ALE member	c. Allocated reduction of full-time employee count for IRC Section 4980H(a)	d. Count of assessable full-time employees with a PTC for IRC Section 4980H(a)	e. Count of assessable full-time employees with a PTC for IRC Section 4980H(b)	f. Applicable IRC Section 4980H provision	g. Monthly ESRP amount
Jan	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Feb	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
March	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Apr	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
May	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
June	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
July	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Aug	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Sep	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Oct	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Nov	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Dec	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
						Total Proposed ESRP	[\$xxx,xxx]

Explanation of the ESRP Summary Table

The ESRP summary table includes the following information.

Column (a). Form 1094-C, Part III, Col (a), Minimum essential coverage offer indicator (offered to at least []%)

This column shows the information you reported on the Form 1094-C, Part III, Column (a) filed with the IRS about whether you offered MEC to at least [] % of your full-time employees and their dependents. If there was no entry on Form 1094-C, Part III, Column (a) for one or more months, each missing entry is shown as “No” in column (a).

Column (b). Form 1094-C, Part III, Col (b), Full-time employee count for ALE member

This column shows the information you reported on the Form 1094-C, Part III, Column (b) filed with the IRS reporting the number of your full-time employees. However, if you did not report the number of full-time employees for any month of the year, the full-time employee count in column (b) will reflect the number you reported on Form 1094-C, Part II, line 20, “Total number of Forms 1095-C filed by and/or on behalf of ALE Member.” If you reported the number of full-time employees for some, but not all months of the year, the full-time employee count in column (b) for each month for which you did not report will reflect the greatest number of full-time employees you reported for any one month of the year.

Column (c). Allocated reduction of full-time employee count for IRC Section 4980H(a)

This column shows the number by which the full-time employee count in column (b) is reduced when computing an ESRP under IRC Section 4980H(a). In general, under IRC Section 4980H(a), an ALE’s number of full-time employees is reduced by its allocable share of 30. If the ALE is not part of an Aggregated ALE Group, the ALE’s allocable share is 30. If the ALE is a member of an Aggregated ALE Group, the ALE’s allocable share is based upon the number of ALE members reported in Part IV of Form 1094-C. For the 2015 year only, transition relief increased 30 to 80 for an employer that certified on Form 1094-C, Line 22 and entered B on Form 1094-C, Part III, Column (e), reporting that it met the criteria for the transition relief. Even if “yes” is entered in column (a) (meaning no ESRP under IRC Section 4980H(a) applies for the month), this column (c) will be filled in because the amount of a potential ESRP under IRC Section 4980H(a) for a month caps the amount of an ESRP under IRC Section 4980H(b) for a month.

Column (d). Count of assessable full-time employees with a PTC for IRC Section 4980H(a)

The number shown for each month is the number of your full-time employees who were allowed a PTC on their individual income tax returns and for whom no provision providing relief is applicable under IRC Section 4980H(a). These employees are listed on the Employee PTC Listing and are referred to as assessable full-time employees. You are subject to an ESRP for any month that IRC Section 4980H(a) applies to you, if there is at least one assessable full-time employee for that month.

Column (e). Count of assessable full-time employees with a PTC for IRC Section 4980H(b)

The number shown for each month is the number of your full-time employees who were allowed a PTC and for whom no safe harbor or other provision providing relief is applicable under IRC Section 4980H(b). These employees are listed on the Employee PTC Listing and are referred to as assessable full-time employees. You are subject to an ESRP for these employees for any month that IRC Section 4980H(b) applies to you, if there is at least one assessable full-time employee for that month.

Column (f). Applicable IRC Section 4980H provision

This column shows whether the ESRP, if any, has been computed under IRC Section 4980H(a) or (b).

Column (g). Monthly ESRP amount

This column shows the proposed ESRP amount per month, if any. Each month is a separate taxable period. The total proposed ESRP amount for the year is shown at the bottom. For more information, see “Calculation of your ESRP” below.

Calculation of your ESRP

Note: References to all columns relate to the ESRP Summary Table above.

We computed your ESRP amount on a month-by-month basis as shown in column (g). For any month, an employer may owe no ESRP or an ESRP under either IRC Section 4980H(a) or 4980H(b) as described below, but not both. (See column (f) for the ESRP provision, if any, that applies to you for each month.)

IRC Section 4980H(a) applies for a month when column (a) Minimum essential coverage offer indicator (offered to at least [70% or 95%]) is marked “No” and column (d) Count of assessable full-time employees with a PTC for IRC Section 4980H(a) is at least one for that same month. An IRC Section 4980H(a) ESRP is computed by taking the number in column (b), IRC Section 4980H full-time employee count for ALE member, subtracting the number in column (c), Allocated reduction of full-time employee count for IRC Section 4980H(a), and multiplying the resulting number by [\$2,080/12 or \$173.33] to arrive at the monthly ESRP amount.

IRC Section 4980H(b) applies for a month when column (a) Minimum essential coverage indicator (offered to at least [70% or 95%]) is marked “Yes” and column (e) Count of assessable full-time employees with a PTC for IRC Section 4980H(b) is at least one for that same month. An IRC Section 4980H(b) ESRP is computed by taking the number in column (e), Count of assessable full-time employees with a PTC for 4980H(b), and multiplying that number by [\$3,120/12 or \$260.00] to arrive at the monthly ESRP amount.

Note: The ESRP amount under IRC Section 4980H(b) in column (g) cannot be more than the amount that would have been proposed under IRC Section 4980H(a) had it applied to you for that same month. If you are a member of an Aggregated ALE Group and are subject to an ESRP under IRC Section 4980H(a) or are subject to an ESRP under IRC Section 4980H(b) that may be limited by IRC Section 4980H(a) cap, please contact the person identified on the first page of this letter to ensure the allocation has been correctly computed.

Additional information

- For more information about this letter, visit www.irs.gov/ltr226J.
- For information about the ESRP and the PTC, visit www.irs.gov/aca.
- For information about the collection process visit www.irs.gov/Publication 594
- For tax forms, instructions and publications, visit www.irs.gov/forms-pubs or call 800-TAX-FORM (800-829-3676).
- Keep this letter for your records.

If you need assistance, please don’t hesitate to contact us.

Sincerely,

Enclosures:
Publication 1
Notice 609
Form 14764
Form 14765
Envelope

ESRP Response

Complete both sides of this form and return it to the address below so that we receive it by . An envelope has been enclosed for your convenience. To request more time to respond, call us at .

Return form to: Department of the Treasury
Internal Revenue Service
Group 2219
7300 Turfway Road, Suite 410
Florence, KY 41042

Provide Your Contact Information

Name

Address (if you changed your address, make the changes below)

Primary telephone number Best time to call

Secondary telephone number Best time to call

Indicate Your Agreement or Disagreement

Agreement with proposed assessment

I consent to the assessment and collection of the of the proposed assessment of the ESRP in the amount of

Signature Date

Print name and title of the person who signed above

Partial/Total disagreement with proposed assessment

I disagree with part or all of the proposed assessment of the ESRP

Indicate Your Payment Option (check all that apply)

Full payment using EFTPS on

Partial payment using EFTPS on

Enclosed full payment of \$

Enclosed partial payment of \$

No payment

- Write your employer ID number , the tax year and ESRP on your payment and any correspondence.
- Make your check or money order payable to the United States Treasury.

Authorization *(optional)*

If you would like to authorize someone, in addition to you, to contact the IRS concerning this proposed ESRP matter, please include the person's information, your signature, and the date.

The authority granted is limited as indicated by the statement above the signature line. The contact may not sign returns, enter into agreements, or otherwise represent you before the IRS. If you want to have a designee with expanded authorization, see IRS Publication 947, Practice Before the IRS and Power of Attorney.

Full name of authorized person

Address

City	State	Country	Zip code
------	-------	---------	----------

Primary telephone number	Best time to call
--------------------------	-------------------

Secondary telephone number	Best time to call
----------------------------	-------------------

I authorize the person listed above to discuss and provide information to the IRS about this letter.

Signature Date

Print name and title of the person who signed above

Employee Premium Tax Credit (PTC) Listing

Any month not highlighted is a month that the employee received a PTC and no safe harbor or other relief from the ESRP was applicable. The employee is an assessable full-time employee for that month.

Employer name										Employer ID number		Tax year				Additional Information Attached
Employee Name <i>(last, first)</i>	SSN <i>(last 4 digits)</i>	All 12 months Indicator Codes <i>(Form 1095-C, lines 14 and 16 combined)</i>	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec		
bob bobbie	1111		NO PTC	No PTC	1E	1E	1E	1E/2C	1E/2C	1E/2C	1E/2C	1E/2C	1E/2C	1H/2A	<input type="checkbox"/>	
Joe Schmoe			no PTC	no PTC	no PTC	no PTC	no PTC	no PTC	1H/2C	1H/2C	1H/2C	1H/2C	1H/2C	1H/2C	<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	
															<input type="checkbox"/>	