IRS BEGINS ISSUING ACA PENALTY NOTICES TO EMPLOYERS

The Internal Revenue Service (IRS) has made good on its promise to begin issuing Employer Shared Responsibility Payment (ESRP) notices to employers that have not provided adequate health insurance to their employees as required under the Patient Protection and Affordable Care Act (ACA). The ESRP notices being sent out are based on the information the IRS received from employers on their IRS Forms 1094-C and 1095-C for the 2015 tax year. Each ESRP notice includes a proposed ESRP amount for the employer to pay, an explanation for how the proposed ESRP amount was calculated, and IRS Forms 14764 (ESRP Response) and 14765 (Employee Premium Tax Credit Listing).

THE BOTTOM LINE

The IRS has started enforcing penalties under the ACA, and ALEs and their staff should be on the lookout for a possible ESRP notice. If an ALE receives a notice, it should reach out to its ERISA counsel immediately and begin reviewing its IRS Forms 1094-C and 1095-C. Any ALE that receives an ESRP notice must typically respond to the IRS within 30 days from the date of the notice using IRS Form 14764 and either pay the proposed ESRP amount or provide additional information for any disagreement with the proposed ESRP amount.

"PAY OR PLAY" PENALTY

An employer with 50 or more full-time equivalent employees is considered an applicable large employer (ALE) and is subject to the ACA employer mandate, which requires ALEs to offer health insurance that is affordable and provides minimum value to 95% of their full-time employees (for the 2015 tax year, this amount was 70%). ALEs that do not provide adequate health insurance may be subject to "Pay or Play" penalties under Section 4980H of the Internal Revenue Code of 1986, as amended (Section 4980H). Section 4980H describes two penalties: the "A Penalty" and "B Penalty."

THE A PENALTY

The A Penalty is triggered when an ALE:

- does not offer health insurance to 95% (or 70% in 2015) of its full-time employees; and
- at least one full-time employee receives a premium tax credit (PTC) to help pay for health insurance on the exchange.

The A Penalty amount is calculated by counting the total number of full-time employees, excluding the first 30 full-time employees (or first 80 in 2015 for employers with 100 or more full-time employees), and multiplying the difference by $188.33 (or $173.33 in 2015). This penalty is calculated each month for which the ALE does not make an adequate offer of health insurance to its full-time employees. For example, an ALE with 100 employees in 2017, who is subject to the A Penalty, would pay $188.33 x 70 for a total of $13,183.33 for every month that coverage was not provided. The same employer would be subject to a total penalty of $158,200 a year.

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THE B PENALTY

The B Penalty is triggered when an ALE:

- >> does not offer "affordable" health insurance that provides "minimum value" to its full-time employees; and
- >> at least one full-time employee receives a PTC to help pay for health insurance on the exchange.

"Affordable" means no employee pays more than 9.69% (or 9.56% in 2015) of their earnings for employee-only health insurance coverage. "Minimum Value" means the health insurance covers at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan.

The B Penalty amount is calculated by multiplying the total number of full-time employees who received a PTC to help pay for health insurance on the exchange by $282.50 (or $260 in 2015). This penalty is also assessed on a monthly basis. The B Penalty cannot exceed the potential penalty due under the A Penalty. Similar to our previous example, an ALE with 100 employees in 2017 of which three employees received a PTC to pay for health insurance on the exchange, who is subject to the B Penalty, would be subject to a penalty of $282.50 x 3 for a total of $847.50 every month. The same employer would be subject to a total penalty of $10,170 a year.

HOW TO RESPOND TO AN ESRP NOTICE

Any ALE that receives an ESRP notice should reach out to its ERISA counsel immediately. Additionally, ALEs should review their IRS Forms 1094-C and 1095-C to see if the ESRP amount is based on accurate data.

If an amendment to the forms is needed or the ALE disagrees with the proposed ESRP amount for any other reason, the ALE should complete IRS Form 14764 and include a statement explaining why it disagrees with part or all of the proposed ESRP amount. The statement should describe changes, if any, the ALE wants to make to the information reported on its IRS Forms 1094-C and 1095-C. The ALE may include documentation to support its statement. The ALE should not file a corrected IRS Form 1094-C and 1095-C with the IRS to report any changes it wishes to make to its IRS Forms 1094-C and 1095-C filed for the tax year shown on the ESRP notice. If an ALE ignores the notice or does not pay the full agreed-upon ESRP amount, the IRS will send out a Notice and Demand for the balance due.

FOR MORE INFORMATION

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