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Enforcement of Employer Mandate Penalty

Employers have been wondering when (or if) IRS enforcement of the Affordable Care Act's (ACA) employer mandate (i.e., the pay or play penalty) will begin. While no formal announcement has been made, recent updates to the [Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act](#) suggest enforcement efforts will begin soon. The IRS has added significant new information and details regarding the enforcement process in questions 55 through 58. This article summarizes the new details the IRS has provided regarding enforcement of the employer mandate penalties and the corresponding appeals procedure.

Q & A 55 provides that if the IRS believes an Applicable Large Employer (ALE) owes an employer mandate penalty, the ALE will first receive a Letter 226J. The Letter 226J will include the following items:

1. An explanation of section 4980H [the employer mandate section of the ACA];
2. A table summarizing the proposed employer mandate penalty for each month, including an explanation as to whether the liability is under section 4980H(a), section 4980H(b), or neither;
3. An explanation of the table summarizing the proposed employer mandate penalty;
4. A Form 14765 containing a list of the ALE's "assessable full-time employees" (individuals who for at least one month received a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief). The Form 14765 will also include the code combinations the employer entered on lines 14 and 16 of the employee's Form 1095-C;
5. A description of the actions the ALE should take if it agrees or disagrees with the employer mandate penalty in the Letter 226J; and
6. A description of what will happen if the ALE does not timely respond to the Letter 226J.

The ALE will typically have 30 days from the date of the Letter 226J to respond. If the ALE does not respond to the Letter 226J within that period, the IRS will assess the proposed employer mandate penalty and issue a notice and demand for payment in the form of a Notice CP 220J. Therefore, any ALE who receives a Letter 226J must respond in a timely manner. A sample letter 226J can be accessed here: <https://www.irs.gov/pub/notices/ltr226j.pdf>.

Q & A 56 outlines the ALE's opportunity to respond before a notice and demand for payment is made by the IRS. The Letter 226J will provide the ALE instructions on responding within the 30 day time frame allowed. If the ALE responds to the Letter 226J, the IRS will reply with a Letter 227. Letter 227 acknowledges the ALE's response to the Letter 226J and describes what further action needs to be taken by the ALE. Apparently, the IRS has created five different versions of Letter 227 and the ALE will receive one of the five depending on its response to Letter 226J.

If after receipt of Letter 227 the ALE still disagrees with the IRS' position, the ALE can request a pre-assessment conference with the IRS Office of Appeals by following the instructions provided in the Letter 227 and [Publication 5](#). The ALE must request the pre-assessment conference in writing by the response date shown on the Letter 227 which is generally 30 days from the date on the Letter 227.

Q & A 57 provides that if the IRS determines a penalty is owed, the IRS will issue a notice and demand for payment in the form of a Notice CP 220J. The Notice CP 220J will include a summary of the penalty due as well as reflect any payments made, credits applied, and the balance due, if any. The notice will also include instructions on making payment.

Finally, **Q & A 58** states that the IRS plans to issue Letters 226J for 2015 calendar year penalties in late 2017. All employers need to be on the lookout for the Letter 226J from the IRS. Given the short time frame for responding, ALEs should ensure they have ready access to data regarding their 2015 group health plan enrollment (including 2015 Forms 1094-C and 1095-C). If your company utilized a vendor for that process, ensure that the vendor has the necessary data available. Consult legal counsel or other experts as needed to make a timely response.

Please visit www.moreton.com/category/compliance-updates/ for more information and to view other client alerts. This Client Alert was written by Carolyn Cox, Moreton & Company's in-house corporate counsel who provides our clients with compliance services. For additional questions, please contact Carolyn at 801-715-7110 or ccox@moreton.com.

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