



The Affordable Care Act (ACA): Notifying an Employer of a Potential Shared Responsibility Payment (ESRP)

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May 16, 2018

The Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) requires that large employers either provide health coverage to full-time employees or face a potential assessment of an Employer Shared Responsibility Payment (ESRP). As explained in CRS Report R43981, *The Affordable Care Act's (ACA) Employer Shared Responsibility Determination and the Potential Employer Penalty*, this “employer penalty” may be assessed by the Internal Revenue Service (IRS) if at least one of employer’s full-time employees obtains a premium tax credit or cost-sharing reduction through a health insurance exchange.

There remains some confusion as to whether the employer penalty was rescinded by the 2017 Tax Cuts and Jobs Act (P.L. 115-97) and whether the IRS is currently enforcing the mandate. While the ACA’s tax penalty associated with the *individual* mandate was modified by the 2017 tax revision, the 2017 law did not make any changes to the *employer* penalty. The requirement that applicable large employers offer affordable health coverage to their workers or pay a penalty is still law and the IRS is actively enforcing the statute. For example, see this May 2018 article in the New York Times (link may require paid subscription).

The ACA requirements to hold employers accountable for offering health coverage were to begin in 2014. However, the IRS provided transition relief in 2014 and did not enforce the ESRP in 2014. There was limited implementation in 2015 for employers with over 100 full-time equivalent (FTEs). Thus, in 2016, close to full implementation for applicable large employers (50 or more FTEs) began with very limited transition relief for tax year 2016 for certain specific circumstances.

After additional delays, the IRS recently began to notify applicable large employers of potential ESRP assessments based upon their 2015 Tax Year in November 2017. News reports began documenting the

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frustration of some firms with the IRS enforcement of the employer penalty soon after (link may require paid subscription).

On April 17, 2018, the House Committee on Oversight held a hearing on the *Continued Oversight of the Internal Revenue Service* where, among other matters, it examined ongoing management issues at the IRS, including the capability to implement the ESRP. At that hearing, the IRS testified that it has identified 32,240 employers with potential ESRP totaling over \$4.3 billion for 2015. By January 2, 2018, the IRS reported notifying 3,820 (11.8%) of those employers of their potential ESRP liability for tax year 2015.

A recent audit by the Treasury's inspector general for tax administration found that some of the processes the IRS uses to ensure compliance with the ESRP did not work as intended or have been delayed, not initiated, or canceled. As of October 28, 2016, the audit found, due to system errors, the IRS was unable to process paper information returns timely and accurately.

How Does an Employer Know if It Has an Employee Receiving a Premium Tax Credit?

There are two ways employers are notified that they have a full-time employee receiving a premium tax credit (and thus, are potentially subject to the shared responsibility assessment): (1) by an exchange when the employee is deemed eligible and then (2) by the IRS after the conclusion of the tax year. However, in 2015, some notices were not sent out and others were delayed until late 2017.

Employer Notice from an Exchange

Under regulation (45 C.F.R. §155.310(h)), exchanges must notify an employer in a “reasonable timeframe” that an employee is eligible for advance payments of the premium tax credit and cost-sharing reductions and enrolls in a qualified health plan through the exchange. Exchanges may be established either by the state itself as a state-based exchange (SBE) or by the Secretary of Health and Human Services as a federally-facilitated exchange (FFE). In states with FFEs, the exchange may be operated solely by the federal government or in conjunction with the state.

The FFEs' employer notification program was not implemented in 2015 and no notifications were sent to employers by the FFEs about employees receiving a premium tax credit or cost-sharing reduction during 2015. The employer notification program began to be phased-in for 2016 with approximately 470,000 notices being sent in June 2016. Because an employer can have multiple employees, fewer than 470,000 unique employers received a June 2016 notice. Similarly, because an employee can have multiple employers, fewer than 470,000 employees were impacted by these notices. Employers may appeal the verification notice if they disagree with the findings.

CRS has not surveyed state exchanges on their notification programs. While many SBEs have stated that they plan on using the federal exchange notification system, it does appear at least some state exchanges had implemented notification in 2015.

Employer Notice from the IRS

As part of its determination of whether an employer has a ESRP liability, the IRS notifies an employer that one or more employees has enrolled for one or more months during a year in a qualified health plan for which a premium tax credit or cost-sharing reduction is allowed or paid (45 C.F.R. §155.310(i)). An employer receives this notification through IRS Letter 226-J.

Given the construction of the ESRP assessment, the employer contact by the IRS for a given calendar year will not occur until after employees' individual tax returns have been filed. For 2015, the IRS began notifying employers of a potential ESRP and announced this via Question 55 in "Questions and answers on Employer Shared Responsibility Provisions Under the Affordable Care Act" on November 2, 2017.

Employers Must Respond

The employer must respond to the IRS within 30 days using IRS Form 14764. The employer may agree or disagree with the computation. If an employer disagrees with the computation, the employer will need to provide a full explanation of the disagreement using IRS Form 14765.

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