

IRS Releases 2018 ACA Information Reporting Draft Forms and Instructions; IRS Also Begins Issuing Letter 5699 to Determine Reporting Compliance

September 24, 2018

1. IRS Releases Draft Information Reporting Forms and Instructions

The IRS recently released draft Forms 1094/1095-C (“the Draft C Forms”), draft Forms 1094/1095-B (“the Draft B Forms”), and related instructions (“the Draft Instructions”) for Information Reporting under the Affordable Care Act (ACA) for the 2018 tax year.

The [Draft Instructions](#) include links to both the Draft C Forms and Draft B Forms.

Background on ACA Information Reporting

Generally, employers sponsoring self-insured and fully-insured health plans that employed fifty (50) or more full-time employees and full-time equivalents in the prior calendar year (“ALE Members”) will be required to complete ACA information reporting by furnishing the “C Forms” to employees, and filing the forms with the IRS in early 2019 for the 2018 calendar year. The “B Forms” are typically filed by insurance carriers, but are also filed by employers sponsoring self-insured plans that employed less than fifty (50) full-time employees and full-time equivalents in the prior calendar year.

The IRS uses the “C Forms” to determine whether ALE Members complied with the

Employer Shared Responsibility (“Pay or Play”) provisions of the ACA. Additionally, with respect to self-insured employers filing the “C Forms,” as well as the entities filing the “B Forms,” the IRS reviews these forms to determine compliance with the Individual Shared Responsibility (“Individual Mandate”) provisions of the ACA.¹

The Form 1094-C is referred to as the “transmittal form.” It summarizes the information contained in the Forms 1095-C, much like an executive summary section of a report. By contrast, the Form 1095-C is referred to as the “employee statement.” It gives information to the employee about the cost of the coverage that the employer offered, among other relevant information. While both the Form 1094-C and Forms 1095-C are filed with the IRS, only the Forms 1095-C are furnished to employees.

How Are the Draft 2018 Instructions Different from the 2017 Instructions?

The rules contained in the new Draft Instructions closely resemble those in the final 2017 instructions, with only a few minor changes. These are:

Name Format Change: In Part III of the draft Form 1095-C, separate fields are included for an individual’s first name,

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The rules contained in the new Draft Instructions for Forms 1094/1095-C and 1094/1095-B closely resemble those in the final 2017 instructions, with only a few minor changes. It’s recommended that plan sponsors review the instructions and note the minor changes, which are detailed in this eAlert.

¹The penalty for the ACA’s Individual Mandate was repealed effective 1/1/2019, but will still be assessed for noncompliance during the 2018 calendar year.

middle initial, and last name, whereas, previously, only a single line was given for an individual's full name. The same type of change is made to Part IV of the draft Form 1095-B.

Plan Start Month: The box on the Form 1095-C entitled, "Plan Start Month," which was designed to indicate when the ERISA plan year begins, will continue to be optional for 2018, but it may be required for 2019 reporting.

Mandatory Electronic Filing: Both the 1095 "B" and "C" series Draft Instructions continue the rule used in prior years that requires electronic filing with the IRS if your organization will be filing 250 or more returns. Under this rule, employers are allowed to apply the 250-return threshold to each type of information return. For example, if an employer files 225 Forms W-2 and 100 Forms 1095-C during 2018, the employer is not required to file either form electronically since, when considered separately, neither form crosses the 250-return threshold. Proposed regulations issued in May of this year (but not finalized, and not applicable to 2018 reporting) would require aggregation of most information returns when calculating the 250-return threshold, and would remove the rule that allows employers to count the number of information returns separately by form type.²

Reporting Relief for Multiemployer Plans: The interim relief that was available in prior years to simplify reporting for ALE Members contributing to multiemployer health plans (commonly referred to as "union plans") will continue for the 2018 reporting year.

Penalties: Penalty amounts for reporting failures include indexed increases (discussed below).

What are the Deadlines for Filing and Furnishing the 2018 Forms 1094-C and 1095-C?

The 2018 Forms 1095-C must be furnished to employees by January 31, 2019, and must be filed with the IRS by February 28, 2019 if filed on paper, and by April 1, 2019 if filed electronically (the filing deadline is normally on March 31, 2019, but that day is a Sunday). Electronic filing is required for parties filing 250 or more forms.

What Should Employers Do Next?

While there may be additional clarifications and modifications made to these new rules once the Draft Instructions are finalized, employers subject to the 2018 ACA information reporting requirements, and their Benefits, HR and Payroll Teams, should still review them, and be

familiar with them, in order to begin the process of understanding how reporting will be different in the fourth year of mandatory compliance. This is particularly important given that no penalty relief has been announced for the 2018 reporting year (at least not yet) and given the steep penalties involved in getting this wrong – a \$270 penalty for each incorrectly filed or furnished return, up to a maximum \$3,275,500 penalty.

2. IRS Begins Issuing Letter 5699

In a related development, the IRS recently began issuing letters to employers to request information about whether they satisfied their ACA reporting obligations for the 2015 and 2016 calendar years. This new letter is entitled "Letter 5699 - Request for Employer Reporting of Offers of Health Insurance Coverage" ("the Letter").

Unlike the IRS' Letter 226J (discussed in our earlier eAlert [here](#)), which is designed to assess penalties for both failing to offer coverage and for offering coverage that did not meet the ACA's minimum requirements, Letter 5699 has a more specific purpose—it is designed to help the IRS understand why an employer did not file the Forms 1094-C and 1095-C in previous years.

Background on "Pay or Play" Requirements and Enforcement

As background, the ACA's Employer Shared Responsibility provisions ("Pay or Play") require employers that employed fifty (50) or more full-time and full-time equivalent employees ("ALEs") to offer Minimum Essential Coverage (MEC) to at least 95% (70% in 2015) of their full-time employees and their dependent children. The penalty imposed for not offering this coverage, under Code § 4980H (a), is referred to as "the large penalty." Additionally, to avoid another Pay or Play penalty, under Code § 4980H(b), ALEs must offer coverage that is "affordable" and provides "minimum value."

The ACA's Pay or Play rules also require ALEs to complete information reporting forms ("the Forms") which provide information about the value and cost of the health

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²Proposed Regulation, *Filing Requirements for Information Returns Required on Magnetic Media (Electronically)*, 83 Fed. Reg. 24948 (May 31, 2018), available [here](#).

insurance coverage that was offered to employees, and which employees and dependents it was offered to. For most employers, this information is provided on the “C Forms” (i.e., Form 1094-C and 1095-C). These rules generally require that employers file the Forms with the IRS, and furnish them to employees.

Why is the IRS Sending out the Letter 5699? What Information is Requested in the Letter?

The IRS is issuing the Letter 5699 to employers that it believes were ALEs during mandatory information reporting years, and therefore were required to, but have not, filed information reporting forms. The Letter was likely designed to assist the IRS in understanding why the Forms were not filed, and to help them to determine whether a penalty can be assessed for not filing, not offering coverage, or possibly both. The Letter also reminds employers that there are penalties for failing to file.

The Letter asks why the Forms were not filed for the tax year(s) in question. To the extent that the employer takes the position that it did file the Forms, Letter 5699 requests that the employer confirm the name and Employer Identification Number (EIN) it used when filing its Forms, along with the date such filing was made.

How Should Employers Respond to the Letter 5699?

The Letter 5699 provides an employer thirty (30) days to respond to the Letter using one of the following five options:

1. The employer was an ALE for the tax year(s) in question but filed its Forms with a different entity;
2. The employer was an ALE for the tax year(s) in question and is including the Forms with its response to the Letter (this option is not available to employers filing 250 or more Forms 1095-C);
3. The employer was an ALE for the tax year(s) in question and will be filing the Forms with the IRS by a specified date (not more than 90 days from the date of the Letter);

4. The employer was not an ALE for the tax year(s) in question; or
5. Another reason, along with a statement explaining why the employer has not filed the Forms, and the actions the employer plans to take to correct the error.

As these options indicate, the IRS does give employers some flexibility with their response. ALEs that have not filed the Forms can provide them to the IRS with their response to Letter 5699. As an alternative, ALEs that have not filed the Forms can commit to filing them within 90 days of the date of the Letter. In both scenarios, a reason for why the Forms were not filed must be provided.

What Should Employers Do Next?

If your organization receives an IRS Letter 5699, you should:

- Carefully review the ACA information reporting Form(s) (if any) filed for the year(s) indicated in the Letter;
- Contact the reporting vendor that your organization worked with during the time frame in question (if applicable) in order to understand why the Forms were not filed correctly; and
- See if the reporting vendor can assist your organization in making the required correction(s).

Given the short time period to respond (30 days), it's important to act quickly and to make sure that the appropriate people at your organization are aware that the Letter has been received. The benefits consultants at Corporate Synergies can assist you and answer questions that you may have about the Letter 5699.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

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