

## IRS Announces that the Affordable Care Act's Pay or Play Penalties will be Assessed Soon

November 30, 2017

In newly-revised [Q&A guidance](#), the IRS has explained how it proposes to assess and collect ACA Employer Shared Responsibility (Pay or Play) payments for the 2015 calendar year.

These Pay or Play payments are the tax penalties that employers face for not offering coverage to their full-time employees or for failing to offer affordable coverage that meets minimum value. Most notably, the new guidance clarifies that these penalties will be assessed in "late 2017," so, they're coming very soon.

### Background on IRS Q&A Guidance on Pay or Play Penalties

For a long time, the IRS has maintained on its website Q&A guidance covering the ACA's Pay or Play rules. These Pay or Play rules, under Section 4980H of the Internal Revenue Code, are of central importance to employers' compliance strategies, not only because of the potentially high penalties for getting them wrong, but also because compliance with these rules is reported on the Forms 1094-C/1095-C, and these reporting rules are complex and contain high penalties of their own for noncompliance.

### What Has Changed and How Does This Affect Employers?

While this Q&A guidance had helped employers navigate these complex ACA Pay or Play regulations, not much had changed since it was first released, and employers did not know when, if ever, those penalties would be assessed. Until recently, this Q&A guidance (in Q&A #57) merely said that the IRS "expects to publish guidance of general applicability describing the employer shared responsibility payment procedures in the Internal Revenue Bulletin before sending any letters to ALEs [Applicable Large Employers] regarding the 2015 calendar year." On November 2, that changed when the IRS updated this Q&A guidance to explain how and when these penalties will be assessed.

### How does an employer know that it owes an employer shared responsibility payment?

The IRS plans to issue a "Letter 226J" to employers that are responsible for Pay or Play penalties. The IRS plans to issue a Letter 226J to an ALE if it determines that, for at least one month in the year, one or more of the ALE's full-time employees was enrolled in a qualified health plan for which a premium tax credit was allowed (and the ALE did not qualify for an affordability safe harbor or other relief from the employer).

As further explained in the Q&A guidance, the Letter 226J will include the following components:

- a brief explanation of section 4980H,
- a penalty payment summary table itemizing the proposed payment by month and indicating for each month if the liability is under section 4980H(a) ("the large penalty") or section 4980H(b) ("the small penalty") or neither,
- an explanation of the penalty payment summary table,
- a response form, Form 14764, entitled "ESRP Response,"
- an "Employee Premium Tax Credit (PTC) List," Form 14765, which lists, by month, the ALE's assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other penalty relief, and the indicator codes, if any,

### Please Note

This is an update to an eAlert distributed by Corporate Synergies on November 13, 2017. The updated information is noted in the blue highlighted paragraph on page 2.

that the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C,

- a description of the actions the ALE should take if it agrees or disagrees with the proposed Pay or Play penalty payment in Letter 226J, and
- a description of the actions the IRS will take if the ALE does not respond in a timely manner to Letter 226J.

The response to Letter 226J will be due by the response date shown on Letter 226J, which generally will be 30 days from the date of the Letter 226J.

Letter 226J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter. Additional information about Letter 226J is available on the IRS website [here](#), and a sample Letter 226J was also released by the IRS, which is available [here](#).

Recently, the IRS issued two sample versions of forms which can be used to respond to a Letter 226J—[Form 14765](#) and [Form 14764](#). Form 14765 allows an ALE to dispute or make corrections for employees for whom a Pay or Play penalty has been assessed if the ALE filed a Form 1095-C on behalf of the employee, the employee received a premium tax credit for one or more months of the tax year in question, and if the ALE member did not report an affordability safe harbor or other relief provision on the employee's Form 1095-C for one or more of the months in which the employee received the premium tax credit. The Form 14764 is used to partially agree or dispute assessed Pay or Play penalties and to make a payment to the IRS for such penalties.

### How Can Employers Appeal the Penalty Taxes?

Based on the language of the Q&A guidance, it appears that the IRS intends to establish an appeals process that is unique to the Pay or Play penalties. Q&A #56 explains how an employer can appeal the penalty assessment and request a "pre-assessment conference" with the IRS. Specifically, Q&A #56 explains:

ALEs will have an opportunity to respond to Letter 226J before any employer shared responsibility liability is assessed and notice and demand for payment is made. Letter 226J will provide instructions for how the ALE should respond in writing, either agreeing with the proposed employer shared responsibility payment or disagreeing with part or all of the proposed amount.

If the ALE responds to Letter 226J, the IRS will acknowledge the ALE's response to Letter 226J

with an appropriate version of Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226J and describe further actions the ALE may need to take). If, after receipt of Letter 227, the ALE disagrees with the proposed or revised employer shared responsibility payment, the ALE may request a pre-assessment conference with the IRS Office of Appeals. The ALE should follow the instructions provided in Letter 227 and Publication 5, Your Appeal Rights and How To Prepare a Protest if You Don't Agree, for requesting a conference with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on Letter 227, which generally will be 30 days from the date of Letter 227.

If the ALE does not respond to either Letter 226J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility payment and issue a notice and demand for payment, Notice CP 220J.

### If an Employer Receives a Notice and Demand for Payment (Notice CP 220J), What Should It Do Next?

The way in which an employer is required to remit the Pay or Play penalty payment to the IRS is described in the new Q&A #57 as follows:

If, after correspondence between the ALE and the IRS or a conference with the IRS Office of Appeals, the IRS or IRS Office of Appeals determines that an ALE is liable for an employer shared responsibility payment, the IRS will assess the employer shared responsibility payment and issue a notice and demand for payment, Notice CP 220J. Notice CP 220J will include a summary of the employer shared responsibility payment and will reflect payments made, credits applied, and the balance due, if any. That notice will instruct the ALE how to make payment, if any. ALEs will not be required to include the employer shared responsibility payment on any tax return that they file or to make payment before notice and demand for payment.

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For payment options, such as entering into an installment agreement, refer to Publication 594, The IRS Collection Process.

While this procedure seems straightforward, it's important to note that the IRS doesn't provide employers with too many bites at the apple before it begins the collections process. Under Publication 594, if your organization doesn't pay the first bill, the IRS will send it at least one more bill, but then, if it doesn't pay after receiving the second bill, the IRS will begin collection actions, which can range from applying your organization's subsequent tax year refunds to taxes due (until paid in full) to seizing property and assets.

#### When does the IRS plan to begin notifying employers of potential Pay or Play penalty payments?

These penalty payments are coming very soon. As explained in Q&A #58, for the 2015 calendar year, the IRS "plans to issue Letter 226J informing ALEs of their potential liability for an employer shared responsibility payment, if any, in late 2017."

This means that notices will be issued within the next 6 weeks or so. It is not clear as to whether the IRS will publish additional guidance in the Internal Revenue Bulletin or elsewhere that explains the notification, appeals and collection procedures for these penalties in greater detail, or whether this Q&A guidance will be all that they will be providing.

#### What Should Employers Do Next?

It's important to note that there isn't a lot of time to appeal the penalties after receiving the Letter 226J or 227—just 30 days. While much of this new Q&A guidance seems reasonable, the 30-day time period to respond is relatively short, especially for very large and complex organizations. It may take more than a week for the correct IRS letter to reach the right person within a very large organization.

Accordingly, if your organization is subject to the ACA's Pay or Play penalties, make sure to be on the lookout for any letters from the IRS about these penalties in the days and weeks ahead in order to ensure that a timely response is provided.

The IRS will likely begin sending Pay or Play penalty payment notifications within the next 6 weeks.

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

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