On Nov. 2, 2017, the IRS released new FAQs on their webpage, entitled “Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act.” In the FAQs, the IRS gives details regarding assessment and collection of ESRPs for the 2015 calendar year (i.e., the first year employers were subject to the employer mandate and ESRPs). Specifically, the IRS guidance gives in-depth information on exactly how applicable large employers (ALEs) will be notified of an ESRP, how employers should respond to or dispute the notification, and how the employer would remit any owed payment to the IRS.

1. WHY IS THE IRS SENDING LETTERS TO ALEs?

As a reminder, employers with 50 or more full-time equivalent employees generally are required to offer coverage to all full-time employees (FTEs) and their children or face paying a penalty under the employer shared responsibility provision. This is commonly referred to as the employer shared responsibility (or employer mandate) penalty.

Generally, one of two type of penalties under the employer mandate could be assessed: “Penalty A” could apply if the employer failed to offer at least minimum essential coverage to at least 95 percent (70 percent for 2015 only) of FTEs and dependents, and at least one FTE received a premium tax credit in relation to their individual policy purchased through the exchange. “Penalty B,” however, might apply if the employer failed to offer health coverage that met minimum value or was considered unaffordable and a FTE received a premium tax credit. Therefore, Penalty A or B is triggered only when a FTE received a premium tax credit (i.e., federal premium assistance) for the cost of an exchange policy.

2. WHEN WILL THE IRS BEGIN NOTIFYING EMPLOYERS OF A POTENTIAL PAYMENT OWED?

According to the guidance, the IRS will issue Letter 226J beginning in late 2017. This letter will be sent to certain ALEs who may owe an ESRP for the 2015 calendar year.

3. HOW WILL THE IRS NOTIFY EMPLOYERS OF A POTENTIAL PAYMENT THEY MIGHT OWE?

Certain employers will receive Letter 226J from the IRS. An employer will receive Letter 226J if the IRS determines that it had one or more FTEs who received a premium tax credit. Letter 226J will describe the general IRS procedures used to determine if an employer actually owes an ESRP.

It is important to note that Letter 226J is not an invoice for payment. Instead, it is a preliminary determination based on data listed on the 2015 Forms 1095-C reported to the IRS and matched to information on individuals who received premium assistance for their individual health policy. In other words, any possible liability for an ESRP is based upon the 2015 data that was reported to the IRS on Forms 1094-C and 1095-C as compared to information regarding FTEs who received a premium tax credit on the exchange.
4. WHAT SHOULD AN EMPLOYER DO WHEN IT RECEIVES A LETTER?
Read the letter and all attached forms carefully. The letter provides detailed information on where the IRS got the information used to calculate the payment and instructions on how to pay or appeal this payment.

5. WHEN SHOULD AN EMPLOYER RESPOND ONCE THE LETTER IS RECEIVED?
A response to the preliminary IRS letter will be due by the date indicated on the letter. That due date will generally be 30 days from the date the letter is generated. Practically speaking, this means that the employer’s response time may be significantly decreased based upon the delivery period.

6. WHO SHOULD AN EMPLOYER RESPOND TO ONCE THE LETTER IS RECEIVED?
The letter will list a specific IRS representative for the employer to contact. The name and contact information of an assigned IRS employee will be provided on the letter, and the employer should follow the instructions provided in the letter under “What you must do.”

7. HOW SHOULD AN EMPLOYER DISPUTE OR APPEAL A PROPOSED ESRP?
If an employer disagrees with the proposed payment, they will have an opportunity to dispute the IRS’s initial determination before having to pay any employer mandate penalties. In other words, the initial letter is not a bill and an employer has an opportunity to dispute the IRS’s information.
To dispute this determination, the employer must complete Form 14764 (ESRP Response) and mail it back to the IRS by the due date listed on the letter. On Form 14764, an employer would include a signed statement that explains the disagreement with the proposed payment and gather all supporting documentation, such as employee waiver forms, payroll records and/or benefit admin system records that prove an offer of coverage was made to a specific employee. If there is no proof or documentation, explain in detail the circumstances in the statement using Form 14764.
If the information reported on the 2015 Forms 1095-C or 1094-C is not correct, make sure the statement describes any of these changes that should be made to Forms 1095-C or 1094-C. Also, make any necessary changes (if any) to the “Employee PTC Listing” portion of Form 14765 using the indicator codes used for Lines 14 and 16 of the Form 1095-C (do not file any corrected forms at this time). Finally, provide any supporting documentation along with the corrected changes listed on Form 14764.

8. WHAT HAPPENS FOLLOWING AN EMPLOYER’S APPEAL OF THE PROPOSED ASSESSMENT?
The IRS will acknowledge the employer’s response, and if the parties continue to disagree on the assessment, the employer may request a conference with the IRS Office of Appeals.

9. WHAT SHOULD AN EMPLOYER DO IF IT AGREES WITH THE IRS’S PROPOSED PAYMENT?
In the event that an employer agrees with the proposed ESRP, the employer will need to complete, sign and date Form 14764 (ESRP Response) and then send back a check or money order along with Form 14764 to the IRS address listed on the letter. The payment and required form must be mailed back no later than the due date listed on Letter 226J.
If enrolled in the Electronic Federal Tax Payment System, the employer can instead pay electronically. If the total amount of the payment due is not paid in full, the IRS will send a Notice and Demand letter for the remaining balance.

10. IF THE APPEAL IS DENIED BY THE IRS, HOW WILL AN EMPLOYER BE NOTIFIED AND MAKE AN ESRP?
If, after reviewing the appeal information, the IRS concludes that an employer in fact owes an ESRP, the IRS will calculate the final amount and issue a demand letter for payment (Notice CP 220J). Notice CP 220J will show the balance due and give instructions on how to make a payment. The employer will not have to include the ESRP on any tax return or submit payment before the demand letter is sent. Further, the IRS may work with employers on payment options (via an installment agreement), if necessary.
11. WHAT HAPPENS IF AN EMPLOYER DOESN’T RESPOND TO THE INITIAL IRS LETTER?

If an employer fails to respond by the response date listed on the first page of the letter, the IRS will send a Notice and Demand letter for the payment that IRS proposed and assessed. The ESRP will be subject to an IRS lien and may levy enforcement actions. In addition, interest will accrue from the date of the notice and demand and continue until the total amount due is paid in full.

As a best practice going forward, the employer should make sure that offers of coverage are documented every year during open enrollment and that signed waiver forms are collected from any FTEs who decline the group health coverage. Also, ensure that indicator codes used in Lines 14 and 16 are correct before filing any 1095-C forms with the IRS.

