

IRS clarifies ACA free-rider penalties

No sooner had IRS Letter 226J hit applicable large employers' mailboxes informing them that they may be liable for a free-rider penalty for failing to provide 75% of full-time employees with minimum value, affordable group health insurance during 2015, than questions regarding the validity of this penalty assessment arose. The IRS has now answered its critics, but whether that answer is sufficient is a different story.

One notice with two appeals or two notices with two appeals? As written, the Affordable Care Act requires the exchange to notify you when employees buy individual insurance on the exchange and qualify for a premium tax credit. Regulations issued by the Department of Health and Human Services in 2013 set up an appeals process, separate from the tax appeals process, for employers to contest employees' eligibility for the credit.

The issue is whether the IRS can independently assess free-rider penalties against you if you didn't first receive that exchange notice. The IRS and HHS have, since 2015, consistently maintained that the IRS can assess penalties, regardless of whether HHS had previously notified you. And, in fact, the HHS rolled out only a limited employer notification program.

According to Kevin Knopf, senior technician reviewer (employee benefits health and welfare), IRS Office of Associate Chief Counsel (Tax-Exempt and Government Entities), the IRS sent Letter 226J to employers based on the information they reported on Forms 1095 and 1094, and not whether they received prior notification that employees qualified for premium tax credits.

On the other hand, those 2013 regulations and the ACA state that the exchange is required to send employers notices of employees' eligibility for premium tax credits, prior to any determination of liability for free-rider penalties.

This issue will take some time to shake out.

Notice CP 220J. If you failed to timely file Form 14764 in response to Letter 226J and Form 14765, or, after considering your response on Form 14764, the IRS still concludes that you're liable for a free-rider penalty, you will receive Notice CP 220J. This is the IRS' notice and demand for payment. If you disagree with the IRS' penalty assessment, you have two options:

- You can file Form 843 and request an abatement
- You can contact the IRS and request that it provide you with a Notice of Claim Disallowance, and then contest your liability in federal court.

If you don't respond to the notice, the IRS will conclude you agree with its assessment.

READ MORE ABOUT IT: The IRS can only work with the information you reported on Forms 1095 and 1094. You can read more about Letter 226J, the free-rider assessment process and typical Forms 1095/1094 mistakes in the February 2018 issue of *Payroll Legal Alert*, which is available in [the archives at payrolllegalalert.com](http://payrolllegalalert.com).