

# Brace for Impact – ACA Employer Penalty Letters Are Coming Soon

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Here is what we know...

On September 19<sup>th</sup>, Senator Lindsay Graham explained during an on-air press conference that one of the primary reasons the Republicans were still trying to pass a “Hail Mary” attempt at “Repeal and Replace” was that the IRS was about to mail 90,000 ACA Large Employer Penalty Letters out to American business owners. He went on to state those letters, in the aggregate, will raise \$4.8 billion in ACA penalties (which calculates to an average penalty of over \$53,000 per letter). The last ditch effort by the GOP would have halted that mailing process, but the Graham/Cassidy bill failed to make it out of the Senate. Therefore, one would assume, those IRS letters are coming before the end of 2017.

Just a few days ago, if you looked at the official IRS website on such matters and looked at the section “**Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act,**” Question # 57 read as follows:

*Does the IRS expect to publish more information about the employer shared responsibility payment procedures?*

*Yes. 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 regarding the 2015 calendar year.*

Well, that part of the IRS Q&A webpage is not there anymore.

On [November 2, 2017](#) the IRS re-wrote the entire section of this FAQ set, as follows:

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

*The general procedures the IRS will use to propose and assess the employer shared responsibility payment are described in Letter 226J. The IRS plans to issue 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 for the employee).*

Letter 226J will include:

- a brief explanation of section 4980H,
- an employer shared responsibility payment summary table itemizing the proposed payment by month and indicating for each month if the liability is under section 4980H(a) or section 4980H(b) or neither,
- an explanation of the employer shared responsibility payment summary table,
- an employer shared responsibility response form, Form 14764, “ESRP Response”,
- an employee PTC list, Form 14765, “Employee Premium Tax Credit (PTC) List” 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 relief (see instructions for Forms 1094-C and 1095-C, Line 16), and the indicator codes, if any, 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 employer shared responsibility payment in Letter 226J, and
- a description of the actions the IRS will take if the ALE does not respond timely 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 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.

**56. Does an employer that receives a Letter 226J proposing an employer shared responsibility payment have an opportunity to respond to the IRS about the proposed payment, including requesting a pre-assessment conference with the IRS Office of Appeals?**

Yes. 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.*

**57. How does an employer make an employer shared responsibility payment?**

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

**58. When does the IRS plan to begin notifying employers of potential employer shared responsibility payments?**

*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.*

*For purposes of Letter 226J, the IRS determination of whether an employer may be liable for an employer shared responsibility payment and the amount of the potential payment are based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed the premium tax credit.*

The IRS has just provided a link Letter 226J. Access the following link to get a copy. <https://www.irs.gov/pub/notices/ltr226j.pdf>

If an employer wants to dispute any IRS ACA Penalty assessment, they will need to do so quickly – the above mentioned time limit of 30 days following the date on the IRS Letter 226J will fly by in a flash. Subtract the days for mailing and internal routing it will take for such a letter to get to the right person in an employer's office, and it is likely that an employer will only really have two to three weeks to deliver back to the

IRS a thoughtful, researched, documented, well-written appeal to any ACA IRS employer mandate tax assessment.

Now is the time to make sure all ALE employers have access to well-organized data about your ACA group health plan enrollment, employee affordability calculations, eligibility records and, of course, copies of the IRS 1094-C and 1095-C forms that were sent into the IRS for the year in question.

#### DISCLOSURE

*Thank you for your interest in our information on the current status of Affordable Care Act and its implementation. While we are happy to provide you our best information and analysis of the regulations promulgated by the Internal Revenue Service, please be advised that the contents and conclusions contained in this article and any email communication are introductory and educational in nature and do not express a formal, enforceable opinion. Nothing contained in this article and any email communication is intended to be used, or relied upon by any taxpayer for the purpose of avoiding taxation and penalties that may be imposed under the Internal Revenue Code. Any statement contained in this article and any email communication relating to any federal tax issue may not be used by any person to support the promotion, marketing of, or used to recommend any transaction for the purpose of avoiding taxation or penalties.*



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