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UPDATE Employer Penalty and 1094-C/1095-C Reporting

Applicable large employers (“ALEs”) may be resting easy, having had no notification from the IRS of 2015 or 2016 assessments under the Employer Shared Responsibility Provisions (the Employer Penalty) and having reasonably expected that the Republican-led administration would limit or choose not to enforce this mandate.

However, the recent failure in the Senate to pass legislation to repeal and replace the Affordable Care Act (“ACA”) has left many employers wondering whether:

- Penalties associated with the Employer Penalty will be enforced; and
- Forms 1094-C and 1095-C will be required going forward.

Recently, the IRS published draft versions of the 2017 Forms 1094-C (<https://www.irs.gov/pub/irs-dft/f1094c--dft.pdf>) and 1095-C (<https://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>). These versions are substantially similar to past Forms. Notably though, the Form 1094-C has reserved areas once used to reflect available transition relief (Line 22 Certifications of Eligibility, Boxes “B” and “C”). Final versions of the Forms are expected in the fall. Draft instructions for the 2017 Forms have not yet been released.

To date there has been no guidance issued by the IRS that eliminates penalties for Employer Penalty violations or fines associated with failures to accurately complete, provide and/or file Forms 1094-C and 1095-C. While some employers may think a Trump-led IRS will ignore these requirements, absent non-enforcement guidance from the agency, employers should continue to comply.

Why Comply? The Alternative May Be Expensive.

The potential penalties are not limited to the "A" and "B" Employer Penalty assessments (which are substantial).

There are also significant penalties associated with failures to accurately complete, provide and/or file Forms 1094-C and 1095-C:

- The penalty for failure to file a correct information return is \$260 for each return for which the failure occurs, with the total penalty for a calendar year not to exceed \$3,193,000.
- The penalty for failure to provide a correct payee statement is \$260 for each statement for which the failure occurs, with the total penalty for a calendar year not to exceed \$3,193,000.
- Special rules apply that increase the per-statement and total penalties if there is intentional disregard of the requirement to file the returns and furnish the required statements.

An employer intentionally ignoring the 1094-C and 1095-C requirement could be assessed penalties of more than \$520 per form, up to **\$6,386,000 per year**.

Next Steps

At this point, ALEs should:

- Prepare for CY 2017 Form 1094-C and 1095-C reporting. The Form 1095-C for CY 2017 will be due January 31, 2018 to ACA FTEs and, for self-insured group health plans, any covered non-ACA FTEs. Filings to the IRS are expected electronically by April 2, 2018 (and, for those eligible, on paper by February 28, 2018). We will update you if any extension of time is announced.
- Prepare to address notifications of a potential penalty assessment from the IRS. Likely, any notices associated with the 2015 calendar year would be issued first, with 2016 notices to follow.
- Continue to identify ACA FTEs using the appropriate measurement method (monthly or look-back) and manage offers and affordability of coverage. Understand any potential penalty liability that exists in your organization.
- Await updates from the IRS, including issuance of the final CY 2017 Forms and Instructions, likely in September or October.

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