

Area of Focus #10 Challenges Remain As the IRS Implements the Employer Provisions of the Affordable Care Act

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*

The IRS has done a commendable job of implementing the various stages of the Patient Protection and Affordable Care Act of 2009 (ACA),² including developing or updating information technology systems, issuing guidance, and collaborating with other federal agencies. The IRS's implementation of the ACA was further tested when certain provisions of the ACA impacting employers became effective in 2015. For example, the law now provides that applicable large employers (ALEs) must offer minimum essential coverage (MEC) to their full-time employees.³ Employers not in compliance with this provision may be subject to an assessable payment, referred to as the employer shared responsibility payment (ESRP).

While the Treasury Regulations provided limited transition relief to ALEs, the ESRP provisions generally became effective January 1, 2015.⁴ The Regulations acknowledged that there are certain categories of employees whose hours of service will be particularly challenging to identify and track, and gave the IRS some flexibility in allowing employers to use a “reasonable method” of crediting hours of service.⁵

The preamble provided a few examples of what may be considered a reasonable method in certain industries, but is far from comprehensive. The IRS has developed webinars for employers and has created an ESRP Q&A page on its website to provide further clarification.⁶ While Q&As are helpful, they do not have the impact of formal guidance (which undergoes a notice and comment period), nor may taxpayers rely on them for penalty defense purposes.

Because there is no “reasonable cause” exception to the ESRP, it is important that ALEs be given an opportunity to directly engage with the IRS and walk through various scenarios. Throughout the year, employers need the ability to explain to the IRS how it determined MEC or how it calculated full-time equivalents (FTEs), and receive a response from the IRS. The ESRP should not be a “gotcha” tax. Taxpayers have the right to be informed and ALEs should be given every opportunity to comply with the business provisions of the ACA.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

3 See IRC § 4980H.

4 Treas. Reg. 54.4890H, T.D. 9655, 79 Fed. Reg. 8544-01 (Feb. 12, 2014).

5 *Id.*

6 See IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act (last visited June 24, 2016); IRS, *ACA Information Center for Applicable Large Employers (ALEs)*, www.irs.gov/Affordable-Care-Act/Employers/ACA-Information-Center-for-Applicable-Large-Employers-ALEs (last visited June 24, 2016).

The IRS has designated that ESRP cases will be worked by a specialized unit under the Small Business/Self-Employed division.⁷ TAS will review the procedures and instructional materials developed by the IRS for this new group of employees, to ensure that these employees are specially trained on the aspects of the ACA that impact business taxpayers. We believe that it would be beneficial for the IRS to assign a single employee to work an ACA case, which would allow an ALE to interact with someone familiar with its particular set of circumstances.

Challenges Remain As the IRS Processes New Information Reports

Starting in the 2016 filing season, employers and health insurers are subject to expanded information reporting requirements. IRC § 6055 requires annual information reporting by health insurance issuers, self-insuring employers, government agencies, and other providers of health coverage. IRC § 6056 requires annual information reporting by ALEs relating to the health insurance that the employer offers (or does not offer) to its full-time employees. Below is a list of information returns the IRS created to meet these reporting requirements:

- Form 1095-B, *Health Coverage* (used by health insurance issuers and carriers to report information about individuals who are covered by MEC and therefore aren't liable for the individual shared responsibility payment);⁸
- Form 1094-B, *Transmittal of Health Coverage* (used by health insurance issuers and carriers to submit Forms 1095-B);
- Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage Insurance* (furnished by ALEs to any full-time employee for one or more months of the year);⁹ and
- Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns* (used by ALEs to submit Forms 1095-C).

On December 28, 2015, the IRS extended the due dates for furnishing Forms 1095-B and 1095-C to individuals from January 31 to March 31, 2016.¹⁰ Furthermore, the IRS extended the due dates for filing these forms with the IRS from February 29 to May 31, 2016 (for paper delivery) and from March 31 to June 30 (for electronic delivery).¹¹ Thus, TAS does not know at this time how many new information returns the IRS will process in the 2016 filing season due to the employer provisions of the ACA becoming effective. The IRS relies on these information reports to verify data relevant to the ESRP liability.¹²

If the IRS receives incomplete or inaccurate data, individual taxpayers and employers may be harmed. For example, if the IRS receives inaccurate data regarding coverage, it may erroneously assess ESRPs on ALEs, which can be costly and time-consuming for both employers and the IRS to rectify. In addition, if the IRS cannot accurately verify coverage information, it will inhibit the IRS's ability to verify eligibility for the small business health care tax credit.

⁷ IRS response to TAS information request (Oct. 22, 2015).

⁸ IRS, *Instructions for Forms 1094-B and 1095-B* (2015), <https://www.irs.gov/pub/irs-pdf/i109495b.pdf>.

⁹ IRS, *Instructions for Forms 1094-C and 1095-C* (2015), <https://www.irs.gov/pub/irs-pdf/i109495c.pdf>.

¹⁰ IRS Notice 2016-4, *Extension of the Due Dates for 2015 Information Reporting Under IRC §§ 6055 and 6056*, <https://www.irs.gov/pub/irs-drop/n-16-04.pdf>.

¹¹ *Id.*

¹² Furthermore, the IRS will rely on these information reports to assess the individual shared responsibility payment. See *Area of Focus: As the IRS Has Gained Experience in Administering the Individual Provisions of the Affordable Care Act, It Has Addressed Some Previous Concerns But a Few Still Remain*, *supra*.

For ACA-related information returns that are filed by employers and health insurance providers, the IRS is unable to verify the data using the taxpayer identification number (TIN) matching program, which may lead to mismatches and unnecessary notices. The TIN matching program is limited to information returns that report payments subject to backup withholding, such as dividends or other income.¹³ In the National Taxpayer Advocate's 2015 Annual Report to Congress, TAS recommended that Congress amend the tax law to allow entities required to file information returns under the ACA to verify TINs with the IRS prior to filing annual information returns.¹⁴

The IRC § 4980D Excise Tax May Ensnare Unwitting Employers

IRC § 4980D imposes an excise tax on employers who maintain a group health plan that fails to meet certain requirements. Notice 2013-54 clarified that employer payment plans (EPPs) and health reimbursement arrangements (HRAs), by their nature, fail to comply with the ACA market reforms that prohibit annual dollar limits (Public Health Service Act § 2711) and require plans to provide cost-free preventive services (Public Health Service Act § 2713). Such prohibited arrangements are subject to an excise tax of \$100 per affected individual, per day, under IRC § 4980D as plans that fail to satisfy ACA market reforms.¹⁵

The 2013 guidance further clarified that employer health care arrangements will not violate the ACA market reform provisions when integrated with a group health plan that otherwise complies with those provisions. Importantly, however, the 2013 guidance provided that these employer health care arrangements cannot be integrated with individual market policies without being subject to the IRC § 4980D excise tax.

Many colleges and universities offer a health care premium reduction arrangement to their students that does not constitute an EPP under the 2013 guidance. In other cases, however, such arrangements may violate ACA market reform provisions if they are not integrated with group health plan coverage. Recognizing that schools may need additional time to adopt a suitable alternative or make other arrangements to come into compliance, the IRS issued Notice 2016-17 stating that it will not assess the IRC § 4980 excise tax on student health coverage for a plan year or policy year beginning before January 1, 2017.¹⁶

These rules are complex, yet the consequences of running afoul of the ACA market reform provisions are severe. Offering temporary relief is a necessary step, but the IRS should conduct outreach to ensure that colleges and universities are not ensnared by the IRC § 4980D excise tax, which applies at a rate of \$100 per day per employee, if a school's group health care plan offered to students fails to satisfy ACA market reforms.

13 See IRC § 3406; Treas. Reg. § 31.3406(j)-1 (2004); Rev. Proc. 2003-9, 2003-8 I.R.B. 516.

14 National Taxpayer Advocate 2015 Annual Report to Congress 383-88 (Legislative Recommendation: *Affordable Care Act Information Reporting: Allow Taxpayer Identification Number Matching for Filers of Information Returns Under IRC §§ 6055 and 6056*).

15 See IRS Notice 2013-54, <https://www.irs.gov/pub/irs-drop/n-13-54.pdf>.

16 See IRS Notice 2016-17, <https://www.irs.gov/pub/irs-drop/n-16-17.pdf>.

Conclusion

As the IRS implements several ACA provisions that impact employers against the backdrop of historically low levels of taxpayer service, the IRS faces new challenges, including processing millions of new information returns from insurers and employers.¹⁷ We acknowledge the tremendous efforts made by the IRS to implement the health care provisions given their interdependency on decisions made by other federal agencies. While the IRS has little control over some of the anticipated risks, such as delayed or inaccurate data reporting, it will be held publicly responsible when the associated problems surface during the tax return filing process.

FOCUS FOR FISCAL YEAR 2017

In Fiscal Year 2017, TAS will continue to:

- Address ACA-related issues as they arise and identify systemic problems, particularly in the areas of data quality and assessments of the ESRP;
- Review the IRS's training materials on the parts of ACA implementation that impact businesses, including concepts such as ALE, MEC, and ESRP;
- Conduct a webinar on how colleges and universities may be impacted by the IRC § 4980D excise tax;
- Consult with external stakeholders to get their perspective on how the filing season went and what additional guidance is necessary from the IRS;
- Assign ACA Rapid Response team members to immediately address any potential ACA systemic issues that arise;
- Encourage both internal and external stakeholders to report any suspected ACA systemic issues on TAS's Systemic Advocacy Management System;¹⁸ and
- Reiterate our recommendation that Congress amend the tax law to allow entities required to file information returns under the ACA to verify TINs with the IRS prior to filing annual information returns.¹⁹

17 Beginning in the 2016 filing season, the IRS will receive and process an estimated 77 million new information returns from employers. IRS response to TAS information request (Oct. 22, 2015).

18 Stakeholders can report suspected systemic issues at <https://www.irs.gov/sams>.

19 National Taxpayer Advocate 2015 Annual Report to Congress 383-88 (Legislative Recommendation: *Allow Taxpayer Identification Number Matching for Filers of Information Returns Under IRC §§ 6055 and 6056*).