ACA — Employer Provisions Still Apply

BY ELLEN L. JOSEPH

Attempts to repeal and replace the Patient Protection and Affordable Care Act (ACA) started almost immediately after its enactment in 2010. On December 22, 2017, President Trump signed into law the Tax Cut and Jobs Act (TCJA), which eliminated the penalty provisions of the "individual mandate." However, the "employer mandate" remains law.

The individual mandate is the requirement that individuals and their dependents maintain minimum essential coverage (MEC)[1] throughout the calendar year.[2] Under the TCJA, the individual shared responsibility payment for failing to have MEC is reduced to zero for years beginning after December 31, 2018.

Internal Revenue Code Section 4980H, shared responsibility for employers regarding health coverage, was not amended by the TCJA. This employer mandate applies to applicable large employers (ALEs), defined below.

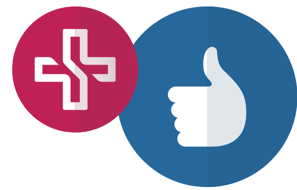
An ALE has an average of 50 or more full-time and full-time equivalent employees during the preceding calendar year. Full-time and full-time equivalents are determined based upon hours of service during each month of the preceding calendar year. Employers with sufficient common ownership are aggregated together as a single employer for purposes of §4980H. Generally, partnerships and proprietorships under common control, controlled groups of corporations and affiliated service group members are aggregated as a single employer for employer shared responsibility purposes.[3]

Often employers or their advisers erroneously assume that because an individual employer entity does not have at least 50 employees on payroll, then they are not an ALE. For example, assume that Joe Restaurateur has two restaurants, each owned by Joe in separate S corporations, each with 35 full-time and full-time equivalent employees in 2017. Because of their common ownership, the restaurants must be aggregated and together are an ALE in 2018, as they have a total of 70 full-time and full-time equivalent employees. In this example, each S corporation is an ALE member.

Once an employer (or employer group) has determined that it is an ALE, it is required to offer its full-time employees and their dependents the opportunity to enroll in MEC. The MEC offered must provide minimum value and must be affordable.[4] Failure of an ALE to offer coverage to at all but five percent (or, if greater, five) of its full-time employees could result in an Employer Shared Responsibility Payment (ESRP). This ESRP is often referred to as the "A" penalty, in reference to Section 4980H(a).

A second ESRP, often referred to as the "B" penalty, could occur if an ALE offers all but five percent (or, if greater, five) of its full-time employees an opportunity to enroll in MEC but the coverage offered did not provide minimum value or was unaffordable.

[1] Minimum essential coverage is health insurance that meets certain statutory criteria and is listed in Internal Revenue Code §5000A(f)
[2] Internal Revenue Code §5000A(a)
[3] Internal Revenue Code §4980H(c)(2)(C)(i)
[4] Treasury Regulations §54.4980H-4(b)(1) and §54.4980H-5(a)



Both the "A" and "B" penalties are determined on a calendar monthly basis. The "A" penalty is $2,000 per full-time employee per year, adjusted annually for inflation; the penalty rate for 2018 is $2,320 or $193.33 per month.[5] The "B" penalty is $3,000 per full-time employee per year, adjusted annually for inflation; the penalty rate for 2018 is $3,480 or $290 per month.[6] An ESRP is triggered when a full-time employee has enrolled in a qualified health plan through the insurance marketplace for a calendar month and received a premium tax credit or cost-sharing reduction.

When calculating the "A" penalty, the number of full-time employees of an ALE during any month is reduced by 30. Transition relief was available to eligible employers for calendar 2015, and for fiscal year insurance plan years that started in 2015. Under this transition relief, the reduction is increased to 80 from 30. It is important to note that this reduction is allocated among ALE group members. For example, if there are two entities that are members of the same ALE, the 30-employee reduction is shared between the two entities ratably based upon the number of full-time employees employed by each.

When calculating the "B" penalty, the total penalty assessed cannot exceed what would otherwise have been the "A" penalty for that month. Thus, if the ALE had a total of 25 full-time employees, offered MEC to all of them and one of those employees received a premium tax credit, the "B" penalty would still be zero because the reduction of full-time employees amount of 30 exceeds the actual full-time employee count used to calculate the "A" penalty.

ALEs are also required to report to their full-time employees and Internal Revenue Service their offers of MEC (or that no coverage was offered) on Form 1095-C and transmittal Form 1094-C. Form 1095-C include a significant amount of information, often on a monthly basis, for a reporting year. The data reported includes whether or not MEC was offered, the type of MEC offered (employee only, family coverage, etc.), the employee's share of the monthly cost of lowest cost employee-only coverage, safe harbor codes for the employer. The safe harbor codes are especially important for employers for months where no insurance coverage was offered to the employee or the employee chose not to enroll in the coverage offered.

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While Form 1095-C are now familiar to most tax practitioners, few are familiar with Form 1094-C, the transmittal. Form 1094-C includes information about the ALE member group, full-time employee counts by month, whether or not the ALE offered MEC to all but five percent (or, if greater, five) of its full-time employees each month, etc. This transmittal form provides information for IRS to determine whether or not an ALE member is subject to an ESRP if any of the employees to whom a Form 1095-C was issued received a premium tax credit.

Beginning in early 2018, ALE members started receiving Letter 226J, preliminary calculation of ESRP owed for tax year 2015. These assessments grow quickly, especially because many ALEs did not offer any insurance to their full-time employees in 2015. There are often many ways to reduce or eliminate the proposed ESRP assessments, and ALEs should seek assistance from practitioners with expertise in this area.

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[5] Internal Revenue Service Website: https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions
[6] Ibid