

AFFORDABLE CARE ACT ► SCOTT SINDER, DON WELLINGTON AND JENNIFER KRENGEL

Beware IRS Letter 226J

Clients face stiff fines if they don't respond within 30 days.

Your clients are starting to get the letters.

Under the Affordable Care Act's so-called "play or pay" mandate, large employers face penalties if they do not offer healthcare coverage that is affordable and that provides minimum value to the vast majority of their workforce. The penalty, referred to as the employer shared responsibility payment, can be significant (as much as \$3,000 per employee). This means even employers with just a few hundred workers could be looking at



penalties approaching \$1 million a year. Larger employers could be exposed to tens of millions or more in penalties.

In November, the IRS issued new FAQs describing the procedures it will use to assess the penalty. The FAQs indicated the IRS would soon be sending penalty notices to employers for 2015. Many of those letters are now in the mail.

One Council member told us two of his clients received letters notifying them their fines are each well into eight figures. Your clients will have only 30 days to respond

to/appeal the notices. Here is what they need to know now.

PLAY OR PAY

Under the ACA's employer shared responsibility provisions, large employers are required to offer their full-time employees health coverage that is "affordable" and that provides "minimum value," or they must pay a non-deductible penalty. The requirement generally applies to employers with at least 50 full-time employees, including part-time employees who, when combined, constitute "full-time equivalent employees." A large employer can become liable for the employer shared responsibility payment (penalty) if it fails to offer the right type of coverage to the right number of employees and just one employee receives a premium tax credit for purchasing individual coverage on a health insurance marketplace.

There are two penalties encompassed in the employer shared responsibility payment. The first penalty applies to large employers who

fail to offer minimum essential health coverage to at least 95% of their full-time employees. This penalty is \$2,000 per year multiplied by the total number of full-time employees, excluding the first 30 employees. The second penalty applies to employers who do offer the required amount of minimum essential health coverage but the coverage is not affordable or does not provide minimum value. This penalty is \$3,000 for each full-time employee who actually receives a premium tax credit, subject to some caps.

PENALTY ASSESSMENT PROCEDURES

In November, the IRS issued FAQs describing the procedures it will use to assess the employer shared responsibility payment. Specifically, the IRS will issue IRS Letter 226J to employers, which will include:

- A brief explanation of employer shared responsibility payment rules
- A payment summary table itemizing the proposed payment by month and liability type and an explanation of the summary table

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REGULATORY NEWS

FLORIDA Approves average 9.5% decrease in workers compensation rates, effective Jan. 1. By industry: office and clerical, -11.5%; goods and services, -10.6%; manufacturing, -10.3%; contracting, -7.19%; miscellaneous, -8.3%. ► Places workers comp carrier Guarantee Insurance in receivership due to \$236,775 shortfall in reserves as of June 30, 2017. Office of Insurance Regulation says company knowingly filed false financial statement regarding reinsurance. Also accuses company of systematically transferring at least \$15.7 million to owner Steve Mariano without a documented business purpose or benefit to company. Mariano also owns Patriot National, a

provider of technology and outsourcing products for insurers that is reorganizing as part of restructuring agreement with lenders. Patriots's subsidiaries are filing for Chapter 11 relief. www.floir.com

LOUISIANA Requires producers to file single license renewal to renew all eligible lines on the license as of Jan. 1. Renewal date still based on last day of birth month, with renewal year determined by license number—odd years for odd license number, even years for even number. Brokerage business renewal date moves to March 31 in even or odd year based on license number. Licenses for portable electronics, however,

remain renewable on Dec. 31 in odd years. Producer renewal fees have also changed. Now: \$50 for one line (other than surplus lines); \$55 for two or more lines (other than surplus lines); \$350 for surplus lines; \$200 for portable electronics; \$50 late filing penalty. www.idi.state.la.us

MINNESOTA Names Jessica Looman commerce commissioner, a role that oversees insurance and other financial services. She replaces Mike Rothman, who resigned to run for attorney general. Looman was deputy commissioner for state Department of Labor and Industry. www.commerce.state.mn.us

MONTANA Records decline in injury and illness rates for 2016, down to 4.2 per hundred full-time workers from 4.3 in 2015. There were 14,300 recordable injuries and illnesses in 2016 with about 6,200 requiring recuperation away from work, transfer from or restriction of work duties, or both. sao.mt.gov

NEW JERSEY Approves 5.1% workers comp rate decrease, effective Jan. 1. Maximum weekly benefit moves to \$903 from \$896 except for permanent partial disability. Minimum weekly benefit moves to \$241 from \$239. For permanent partial disability, maximum weekly benefits

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- ► An employer shared responsibility response form
- Information about employees of the employer who received a premium tax credit
 - A description of the actions the employer should take if it agrees or disagrees with the proposed employer shared responsibility payment
 - A description of the actions the IRS will take if the employer does not respond in a timely manner.

Importantly, the employer's response will be due 30 days from the date of the letter. As a practical matter, employers may only have a few weeks to respond given the time it will take for the letter to be mailed to the employer. The IRS will determine whether an employer may be liable for the employer shared responsibility payment, including the amount of the payment, based on information reported to the IRS on Forms 1094-C and 1095-C and information about

full-time employees who were allowed the premium tax credit.

Two things to note about the IRS Letter 226J. First, a recent Department of Treasury Inspector General report found that the IRS has struggled to correctly analyze the 1094-C and 1095-C returns. According to a recent *New York Times* piece, this already has resulted in receipt of numerous letters that appear to have grossly miscalculated fines. Your clients should therefore be vigilant in reviewing/analyzing any IRS Letter 226J they receive.

Second, some are now contending the IRS 226J letter is deficient because it purports to simultaneously satisfy the ACA requirement that the exchanges provide notice to employers of employees who have enrolled in exchange-provided coverage and were certified as eligible to receive a tax subsidy. This might be an issue that bears monitoring, particularly if an employer would have contested an employee's eligibility for a subsidy.

WHAT TO DO?

Given the incredibly short period for employer responses, all large employers should prepare now in case they receive

an IRS Letter 226J. You and your clients should review 2015 Forms 1094-C and 1095-C to determine if they include any flags. For example, do the forms show the employer made an offer of coverage to at least 70% (required percentage in 2015) of its full-time employees in 2015? If not, engage help now to determine how you will respond to 226J. You should also review your 2015 Forms 1094-C and 1095-C to determine if they are accurate. Identifying errors early will ensure you can address them within the tight time frame.

If your client does receive an IRS Letter 226J:

- Review the information in the letter to confirm it is consistent with what was reported on your Forms 1094-C and 1095-C. Determine whether there is any basis to dispute the proposed assessment, in whole or in part.
- Respond in writing, either agreeing with the proposed employer shared responsibility payment or disagreeing with part or all of the proposed penalty assessment. There should be backup documentation to justify your disagreement.

► If there were errors in the Forms 1094-C or 1095-C as submitted, adhere to the Letter 226J instructions regarding how to correct those forms through the 226J process rather than through filing an amended form.

► If there is a disagreement, a pre-assessment conference also can be requested.

► Finally, if all else fails, there are appeal rights to dispute any final penalty determination with which you or your client disagrees.

Time will be of the essence. Any disputes not asserted in response to the initial 226J letter will be lost, so it is critical your clients be prepared so—if they do indeed receive a letter—they are best situated to minimize or eliminate any assessed penalties.

Sinder is The Council's chief legal officer and Steptoe & Johnson partner.
ssinder@steptoe.com

Steptoe Partner Don Wellington
dwellington@steptoe.com) and
Jennifer Krengel, of counsel
jkrengel@steptoe.com), focus on
 employee benefit tax issues.



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ranging from \$239 to \$896 rise to \$241 to \$903. Minimum weekly benefit for permanent partial injury remains \$35.
www.state.nj.us/dobi/insmnu.shtml

NEW YORK Division of Financial Services forms new state insurance advisory board to advise superintendent on insurance matters. Ten-member board consists of seven domestic insurer reps, one producer and two consumer representatives. Each serves for three years without compensation. The board members are David Anderson, Health Now; Chuck Bell, Consumers Union; Lucy Fato, AIG; Roger Ferguson Jr., TIAA; Karen

Ignagni, Emblem Health; Deanna Mulligan, Guardian; Jacqueline Quintal, Aon; Diane Spicer, Healthcare for All New York; Bernie Turi, Utica National; and Michael Zrone, MetLife. www.dfs.ny.gov

OHIO Statehouse passes bill to bar undocumented workers from receiving workers comp benefits and all workplace injury/illness compensation. "An illegal alien or unauthorized alien assumes the risk of incurring such injury or contracting an occupational disease, and that assumption is a complete bar to a recovery of damages for such injury or occupational disease," the bills states. Bill is headed to

Senate at press time, where similar version failed last year. www.insurance.ohio.gov

OKLAHOMA Kim Bailey resigned as executive director of state Workers Compensation Commission. Administrative Law Judge Patricia Sommer named interim head and will suspend activity as judge while in the position. Bailey is moving to another unnamed role in state government.
www.oid.ok.gov

SOUTH DAKOTA Selects Technology Insurance as workers comp assigned risk plan carrier as of Jan. 1. Five-year contract. Previous carrier, Riverport

Insurance Company, will service runoff business related to its contract term.
dlr.sd.gov/insurance/

TENNESSEE Commissioner Julie McPeak elected president of National Association of Insurance Commissioners for 2018.
www.tn.gov/commerce/section/insurance

TEXAS Department of Insurance proposes workers comp insurers pay 2% of premium in 2018 to fund Division of Workers Compensation and Office of Injured Employee Counsel, up from 1.8%. Asks for additional tax of .054% of premium, up from .016%, to fund Workers Compensation