

General Guidance on 226-J Penalty Letters on Employer Reporting from the Internal Revenue Service

January 14, 2020

What's a "226-J Letter"?

Employers with at least 50 full-time employees must file IRS Forms 1094/1095-C to report what, if any, health insurance coverage was offered to employees during that taxable year. Employers also use a number of different codes to indicate on a per person per month basis, the type of coverage being offered, and whether that coverage is affordable in accordance with IRS "safe harbor" conditions, so that the IRS can then ultimately determine if the employer adequately complied with "employer shared responsibility" requirements owed under the Affordable Care Act (ACA).

At that same time, when employees opt to enroll in alternative health insurance coverage through a state or federal healthcare exchange program, and qualify for a federal subsidy to reduce that person's monthly health insurance premium, they must indicate on their enrollment application on Healthcare.gov that they were not offered health insurance coverage through an employer. In late 2017, the Internal Revenue Service (IRS) began issuing "226-J Letters" to employers who had employees enrolled in subsidized coverage through a state or federal healthcare exchange program, and who (based on the employer's filing of its 2015 Forms 1094/1095-C) had some sort of data discrepancy that potentially indicated the employer had not complied with its requirements under Code Section 4980H.

The 226-J Letter is the IRS's effort to give an employer an opportunity to provide additional information about the proposed "employer shared responsibility penalty" (ESRP) assessment listed in the 226-J Letter. The IRS has now issued additional 226-J Letters for the 2016 and 2017 tax years and will likely be issuing 226-J Letters for the 2018 tax year soon.

What to Do if You Receive an IRS Form 226-J Notice:

- Breathe and understand this is only a "preliminary calculation" of your proposed ESRP amount. Depending on the size of employer, the proposed ESRP can be significant. Understand that this is not an actual assessment of any liability amount you may actually owe.
- Understand that the IRS gives each employer full opportunity, using the provided IRS Form 14764 to dispute this calculation and provide additional information for the IRS to review before issuing any further liability assessment.
- Don't ignore or delay dealing with the 226-J Letter you receive. Even though the IRS gives each employer the opportunity to agree/disagree/or partially agree with the ESRP calculation (the employer can go ahead and make payment of any ESRP amount if it otherwise agrees to the calculated amount), the employer only has a set period of time (generally 30 days) to respond or the calculated amount will be assumed correct and further assessment will be made thereafter.
 - **The IRS will issue an assessment of the ESRP liability amount listed on the 226-J Letter if you do not respond in a timely manner and they will issue a Notice of Intent to Levy on company assets that is an enforceable liability against the company at that point.**
 - The IRS will informally work with employers to appeal the ESRP penalty and Levy assessment if the employer or its representative contacts the IRS for a re-review of the 226-J Letter findings.
- Understand that the vast majority of proposed ESRP assessments are because the IRS has incorrect or incomplete data from the Form 1094/1095-C filings made for the applicable tax year.

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continued

- Review the list of employees included on the IRS Form 14765 to determine if they are all actually employees of your organization and gather previously filed Forms 1095-C for each individual to determine if the information provided is accurate, or if other changes need to be made in your IRS response. The IRS provides a process for further correction of any errors in original Form 1095-C filings that had been made on the provided Form 14765.
- If you choose to dispute the IRS ESRP calculation, prepare a Form 14764 with a statement to explain your reasons for disagreeing with the IRS ESRP calculation. Supporting documentation should be included to evidence the reasons for disputing the IRS calculation, such as any written documentation of an employee's prior offering of qualifying coverage.
- Remember that if you filed Forms 1094/1095 for more than one entity (such as multiple restaurant locations under different company names who are under the same corporate control), it is entirely possible the IRS will issue separate 226-J Letters for each entity and thus you need to ensure that all organizations know and understand the timing and compliance responsibility owed to the IRS for each other entity as well.
- Understand that you can appoint a third-party representative to assist you in discussing the matter further with the IRS, including engaging in further discussions with the IRS without any admittance of liability on your part in the process.
- Continue with efforts to comply with Form 1094/1095 filings for the taxable year, and future tax years unless/until further guidance is issued by the IRS.

Who should you contact if you receive a 226-J Letter or have any other questions?

The Restaurant Law Center provides members of the National Restaurant Association free general information on frequently asked questions on this topic and may direct members to public websites where additional information can be obtained. However, the Restaurant Law Center cannot provide legal advice on a specific case.

For direct and confidential legal advice, we recommend you contact our Law Firm Partner below.

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