IRS Will Enforce Employer Mandate Regardless Of Any Executive Orders

Insights
9.05.17

You may recall that President Trump signed an executive order on the day of his inauguration directing all agencies to minimize the economic burden of the Affordable Care Act (ACA) pending its repeal. You may recall also that employers were not mentioned specifically, though the executive order explicitly instructed agency heads to reduce the fiscal burden on individuals and states.

Seven months later, the ACA still has not been repealed, and it remains unknown whether it ever will be. This uncertainty has left many employers wondering if penalties will be assessed in the future and whether they should revisit their ACA compliance strategies.

Current IRS Position: Compliance Is Still Necessary

The Office of Chief Counsel for the Internal Revenue Service has confirmed that employers are still subject to the employer shared responsibility payments (ESRPs) until the ACA is modified or repealed by Congress, because an "executive order does not change the law." The Office of Chief Counsel also confirmed that the IRS plans on assessing penalties against individuals who do not have the necessary minimum health coverage, even though the executive order instructed agencies to avoid assessing fines against individuals.

This is consistent with letters the IRS began sending at the end of 2016, notifying employers that they may not have successfully complied with their ACA reporting obligations. These IRS letters provided an opportunity for employers to file ACA returns if they had not met their obligation to do so. In the alternative, employers could inform the IRS that they were not an applicable large employer (ALE), or inform the government that they already filed their returns. Many speculated that these letters meant the IRS was preparing to assess fines because such a verification process is usually a preliminary step before reviewing noncompliance.

Additionally, marketplaces began sending notices to employers of their right to appeal the determination that allowed employees to receive premium tax credits. Although these notices do not assess penalties, they could be a precursor to the actual assessment of fines.

Summary Of ACA Penalties

Under the ACA, ALEs are required to offer full-time employees minimum essential health care coverage that is affordable and provides minimum value. If they do not, and a full-time employee receives a premium tax credit to purchase individual coverage through a marketplace, the employer may be assessed an Employer Shared Responsibility Payment (ESRP).

The amount of the penalty depends on the number of full-time employees to which the ALE made an offer of coverage. If it makes an offer of coverage to at least 95 percent of its full-time employees, and one or more of its full-time employees receives a premium tax credit, the ESRP is calculated for each month. For 2017, the amount of the ESRP for any given month is equivalent to the number of full-time employees who received a premium tax credit for that month multiplied by one-twelfth of $3,390.

If, however, an ALE makes an offer of coverage to fewer than 95 percent of its full-time employees, and one or more full-time employees receive a premium tax credit, the ESRP in 2017 is generally equal to the number of full-time employees, less 30, multiplied by $2,260.

What Does This Mean For Employers?

The IRS has made it clear that unless, and until, Congress repeals or amends the individual and employer mandates, it plans to enforce both obligations, regardless of the existing order from the executive branch. This means that you should continue following your current ACA compliance strategy if you wish to avoid penalties, perhaps revisiting the strategy if you have not done so recently.

You should keep documentation and plan on complying with the ACA in 2018. This includes having the necessary information for timely ACA reporting. You should be prepared to provide copies of Forms 1095-C to individuals by January 31, 2018, and to electronically file forms by April 2, 2018.

For more information, contact the author at MShimizu@fisherphillips.com or 949.798.2162.

Service Focus

Employee Benefits and Tax