



# The Next Wave Of ACA Penalties Is Here

Insights

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As you may recall, [a previous article recently published in the Benefits Update newsletter](#) reviewed the letters that employers were beginning to receive regarding potential liability for employer shared responsibility payments (ESRPs) pursuant to the Affordable Care Act's employer "play-or-pay" mandate. The IRS first began sending these letters in late 2017; the letters proposed and assessed Section 4980H(a) penalties for 2015—the first year that "applicable large employers" (ALEs) could be assessed ESRPs. Now, the second shoe has dropped: employers are beginning to be levied penalties for non-compliance of Section 4980H(b), which has the potential to cover a much broader group of employers.

## Types Of Penalties

There are two types of ESRPs: Section 4980H(a) and (b) penalties. An (a) penalty may be assessed when an ALE does not offer minimum essential coverage to at least 95 percent of its full-time employees, and at least one full-time employee receives a premium tax credit (PTC). However, for 2015, there was transitional relief and ALEs only had to offer coverage to at least 70 percent of their full-time employees to avoid the (a) penalty.

A (b) penalty may be assessed if an ALE offers minimum essential coverage to at least 95 percent of its full-time employees, but at least one full-time employee receives a PTC because the particular coverage offered was not considered affordable and/or did not provide minimum value.

## Challenging An ESRP Assessment

In general, ALEs have 30 days to challenge or accept an ESRP penalty. If the IRS does not receive a response by the due date, it will issue a Letter 5040-J requiring payment within 15 days.

If an ALE challenges an ESRP penalty, it should explain in writing why the penalty does not apply. Many times, this requires describing errors on Forms 1094-C and/or 1095-C. When possible, it is preferable to provide supporting documentation. On occasion, when ALEs challenged the (a) penalties and the IRS ultimately agreed that the ALE had offered minimum essential coverage to at least 70 percent of their full-time employees in 2015 and avoided (a) penalties, the IRS then went on to assess (b) penalties instead.

## First Of The (b) Penalty Assessments Received

Recently, ALEs began to receive Letters 226J relating solely to (b) penalties for 2015. Prior to this, we had not seen IRS send Letters 226J that did not involve (a) penalties. This is significant because it

could mean that most of the 2015 (a) penalty letters have already been sent.

It is also significant because (b) penalties will likely impact a much broader range of ALEs. In addition, we understand that the IRS will soon begin sending Letters 226J for 2016 ESRP penalties.

### **Next Steps**

The process for responding to a Letter 226J assessing a (b) penalty will not differ significantly from responding to a letter assessing an (a) penalty. However, given the technical nature of these forms and potential for significant exposure, it may be beneficial to get legal counsel involved in the drafting of the response and any negotiations with the IRS.

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