



Responding to IRS Letter 226 J

**Presented by Benjamin J. Conley, Partner
Seyfarth Shaw LLP**

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QUESTIONS?

You may ask your question in the questions box at any time. Any questions that we do not answer during the webinar will be posted on the compliance corner webpage in the coming weeks.

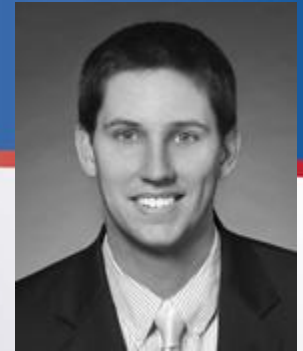
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TODAY'S PRESENTER

Benjamin J. Conley, Partner Seyfarth Shaw LLP



- Mr. Conley is a partner in the Chicago office of Seyfarth Shaw LLP. He focuses his practice on employee benefit plans. Mr. Conley has experience counseling clients on qualified retirement plans, health and welfare plans, and executive compensation.
- Mr. Conley regularly advises clients on defined benefit and defined contribution plan compliance, including corrections for plan operational errors. He assists clients in drafting plan documents, plan amendments and participant communications. He also advises clients on health & welfare plan compliance, including medical and dental plans, cafeteria plans, flexible spending accounts and dependent care spending accounts. Mr. Conley counsels clients on plan design decisions relating to COBRA, HIPAA privacy regulations and health care reform legislation.
- Mr. Conley is a member of the firm's Health Care Reform Team. This cross-departmental team of lawyers was formed to focus on how health care reform will affect our clients. Mr. Conley started closely following health care reform well before it was passed into law. He regularly consults with governmental agencies on health care reform developments and has submitted comments on health care reform interim regulations on behalf of clients. Mr. Conley has presented extensively on health care reform and what it means for businesses, including leading the Healthcare Reform Certification Program offered by the Employer Healthcare Congress.
- Mr. Conley serves as the editor and primary articles contributor for the Mid American Group Quarterly Benefits Newsletter. He has written articles concerning health care reform legislation, employer wellness programs, fiduciary responsibilities, claims review procedures and retiree medical benefits. Prior to joining Seyfarth, Mr. Conley was a lead articles editor for the *Washington & Lee University Law Review*.

Tax Reform – Update

- Senate Bill reduces individual mandate penalty to \$0, beginning 1/1/19
- Still must be rolled into House Bill (but likely will be)
- Does not impact employer mandate or other aspects of ACA
- Does not impact ACA reporting (at least not immediately or materially)

Background: What Employers are Subject to Employer Shared Responsibility Requirements?

- Threshold for “Large Employer” = 50 Full-time Equivalent Employees in prior year*
- Full-time employees = 30 hours per week, on average



- Special rules for seasonal employees

Background: What Employers are Subject to Employer Shared Responsibility Requirements?

- Related entities must be considered together, as one employer
- Related generally means:
 - Parent-subsidary - 80% owned up and down chain
 - Brother-sister companies - 80% owned by same 5 or fewer people
- Creating new companies in same controlled group will not allow you to get below 50 employee threshold

Background: What is the Employer Shared Responsibility Penalty?

Employer is subject to “big” penalty if:

- Employer fails to offer “minimum essential coverage”

AND

- At least one employee receives a tax credit or subsidy through an exchange

“Big” Penalty = \$2,080 x # of Full-time Employees

- Subtract first 80 full-time employees when calculating the penalty for the 2015 plan year
- Subtract first 30 full-time employees when calculating the penalty for plan years on or after 2016
- The penalty is assessed based on the number of *full-time employees*, not the number of full-time equivalents.

Background: What is the Employer Shared Responsibility Penalty?

- Effective date:
 - January 1, 2015 for employers with 100 or more employees
 - must cover only 70% of the workforce in 2015
 - increases to 95% in 2016
 - Note: Penalty still applies for the 30% (5% starting in 2016). But the applicable penalty is the “small penalty” (discussed below)

Background: What is the Employer Shared Responsibility Penalty?

- Employer offers health insurance coverage, but not affordable coverage that provides minimum value
 - Affordable – Cost of coverage no more than 9.5% of household income
 - Minimum value – Covers at least 60% of actuarial value of health costs
 - Note: No coverage to an employee (where part of the 5% leeway (30% for 2015)) would equate to coverage not offering minimum value
- Any employee receives a tax credit or subsidy through a state-based exchange

Background: What is the Employer Shared Responsibility Penalty?

PENALTY

THE LESSER OF:

$\$2,080 \times (\text{Total No. of Full-Time Employees} - 80^*)$

$\$3,120 \times \text{No. of Full-Time Employees who receive a tax credit or subsidy and purchase coverage through an Exchange}$

Form 1094-C (Parts I and II)

Form 1094-C Department of the Treasury Internal Revenue Service	Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns ► Information about Form 1094-C and its separate instructions is at www.irs.gov/ef1094c .	<input type="checkbox"/> CORRECTED 120115 OMB No. 1545-2251	2014
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Part I Applicable Large Employer Member (ALE Member)

1 Name of ALE Member (Employer)		2 Employer identification number (EIN)	
3 Street address (including room or suite no.)			
4 City or town	5 State or province	6 Country and ZIP or foreign postal code	
7 Name of person to contact		8 Contact telephone number	
9 Name of Designated Government Entity (only if applicable)		10 Employer identification number (EIN)	
11 Street address (including room or suite no.)			
12 City or town	13 State or province	14 Country and ZIP or foreign postal code	
15 Name of person to contact		16 Contact telephone number	

For Official Use Only

17 Reserved ☐

18 Total number of Forms 1095-C submitted with this transmittal ►

Part II ALE Member Information

19 Is this the authoritative transmittal for this ALE Member? If "Yes," check the box and continue. If "No," see instructions ☐

20 Total number of Forms 1095-C filed by and/or on behalf of ALE Member ►

21 Is ALE Member a member of an Aggregated ALE Group? ☐ Yes ☐ No
 If "No," do not complete Part IV.

22 Certifications of Eligibility (select all that apply):

☐ A. Qualifying Offer Method
☐ B. Qualifying Offer Method Transition Relief
☐ C. Section 4980H Transition Relief
☐ D. 98% Offer Method

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature _____

Title _____

Date _____

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.
Cat. No. 61571A
Form 1094-C (2014)

Form 1094-C (Part III)

Form 1094-C (2014)

120215

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Part III ALE Member Information—Monthly

		(a) Minimum Essential Coverage Offer Indicator		(b) Full-Time Employee Count for ALE Member	(c) Total Employee Count for ALE Member	(d) Aggregated Group Indicator	(e) Section 4980H Transition Relief Indicator
		Yes	No				
23	All 12 Months	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
24	Jan	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
25	Feb	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
26	Mar	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
27	Apr	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
28	May	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
29	June	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
30	July	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
31	Aug	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
32	Sept	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
33	Oct	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
34	Nov	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
35	Dec	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	

Form 1094-C (2014)

Form 1094-C (Part IV)

120315

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Form 1094-C (2014)

Part IV Other ALE Members of Aggregated ALE Group

Enter the names and EINs of Other ALE Members of the Aggregated ALE Group (who were members at any time during the calendar year).

Name	EIN	Name	EIN
36		51	
37		52	
38		53	
39		54	
40		55	
41		56	
42		57	
43		58	
44		59	
45		60	
46		61	
47		62	
48		63	
49		64	
50		65	

Form 1094-C (2014)

Form 1095-C

Form 1095-C

Department of the Treasury
Internal Revenue Service

Employer-Provided Health Insurance Offer and Coverage

► Information about Form 1095-C and its separate instructions is at www.irs.gov/1095c.

☐ VOID

☐ CORRECTED

OMB No. 1545-2251

2014

Part I Employee

1 Name of employee		2 Social security number (SSN)		7 Name of employer		8 Employer identification number (EIN)	
3 Street address (including apartment no.)				9 Street address (including room or suite no.)		10 Contact telephone number	
4 City or town	5 State or province	6 Country and ZIP or foreign postal code		11 City or town	12 State or province	13 Country and ZIP or foreign postal code	

Part II Employee Offer and Coverage

	All 12 Months	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
14 Offer of Coverage (enter required code)													
15 Employee Share of Lowest Cost Monthly Premium, for Self-Only Minimum Value Coverage	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
16 Applicable Section 4980H Safe Harbor (enter code, if applicable)													

Part III Covered Individuals

If Employer provided self-insured coverage, check the box and enter the information for each covered individual. ☐

(a) Name of covered individual(s)	(b) SSN	(c) DOB (if SSN is not available)	(d) Covered all 12 months	(e) Months of Coverage											
				Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
17			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 60705M

Form **1095-C** (2014)

Form 1095-C (Part II)

Part II Employee Offer and Coverage													
	All 12 Months	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
14 Offer of Coverage (enter required code)													
15 Employee Share of Lowest Cost Monthly Premium, for Self-Only Minimum Value Coverage	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
16 Applicable Section 4980H Safe Harbor (enter code, if applicable)													

Form 1095-C (Part II)

- Line 14 Codes for types of coverage offers
 - 1A – **Qualifying Offer**
 - 1B – MEC with MV to employee
 - 1C – MEC with MV to employee and MEC to dependent
 - 1D – MEC with MV to employee and MEC to spouse
 - 1E – MEC with MV to employee and MEC to spouse and dep
 - 1F – MEC without MV to employee, spouse and dependents
 - 1G – Offer to non-full-time employee
 - 1H – No offer of coverage to non-full-time employee
 - 1I – **Qualifying Offer Transition Relief**: No offer of coverage

Form 1095-C (Part II)

- Line 16 Codes for safe harbors and other relief
 - 2A – Employee not employed on any day during the month
 - 2B – Employee not a full-time employee and did not enroll in MEC, or is a full-time employee but terminated during month
 - 2C – Employee enrolled in coverage offered
 - 2D – Employee is in a Section 4980H Limited Non-assessment Period (e.g., initial measurement period)
 - 2E – Multiemployer plan transition relief applies
 - 2F – W-2 safe harbor for affordability used
 - 2G – Federal poverty line safe harbor for affordability used
 - 2H – Rate of pay safe harbor for affordability used
 - 2I – Non-calendar year transition relief applies

Form 1095-C (Part III)

Part III Covered Individuals

If Employer provided self-insured coverage, check the box and enter the information for each covered individual. ☐

(a) Name of covered individual(s)	(b) SSN	(c) DOB (If SSN is not available)	(d) Covered all 12 months	(e) Months of Coverage											
				Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
17			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 60705M

Form **1095-C** (2014)

2018 Reporting Deadlines

Action	Deadline
Send 1095-Cs to Employees	January 31, 2018
Submit Forms to IRS (Paper Filer)	February 28, 2018
Submit Forms to IRS (E-Filer)	April 2, 2018

IRS Penalty Notice

- IRS recently announced that 2015 penalty notices will be distributed “in late 2017”.
- Notice (“Letter 226J”) will inform employer that a full-time employee has received a tax credit.
- Employer will have an opportunity to appeal – appeal must be received within 30 days.

IRS Penalty Notice

- What's in the notice?
 - A table itemizing the proposed payments by month (and specifying whether (a) or (b) penalty applies)
 - An explanation of the table
 - An employer response form (Form 14764)
 - Listing of employees triggering penalties (Form 14765)
 - Next steps— **including responding to the Letter 226J within 30 days of date of letter**
 - Consequences of failing to act
 - IRS Contact info

IRS Penalty Notice



Department of the Treasury
Internal Revenue Service
Group 2219
7300 Turfway Road, Suite 410
Florence, KY 41042

Tax year:

Letter date:

Employer ID number:

Contact name:

Contact ID number:

Contact telephone number:

Contact e-fax number:

Response date:

Dear

We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.

Proposed ESRP \$ [XXXXXX]

Our records show that you filed one or more Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS. Our records also show that for one or more months of the year at least one of the full-time employees you identified on Form 1095-C was allowed the premium tax credit (PTC) on his or her individual income tax return filed with the IRS. Based on this information, we are proposing that you owe an ESRP for one or more months of the year.

You generally owe an ESRP for a month if either:

- You did not offer minimum essential coverage (MEC) to at least []% of your full-time employees (and their dependents) and at least one of your full-time employees was certified as being allowed the PTC; or

IRS Penalty Notice

ESRP Summary Table

	Information Reported to IRS						
Month	a. Form 1094-C, Part III, Col (a) Minimum essential coverage offer indicator offered to at least [70% or 95%]	b. Form 1094-C, Part III, Col (b) Full-time employee count for ALE member	c. Allocated reduction of full-time employee count for IRC Section 4980H(a)	d. Count of assessable full-time employees with a PTC for IRC Section 4980H(a)	e. Count of assessable full-time employees with a PTC for IRC Section 4980H(b)	f. Applicable IRC Section 4980H provision	g. Monthly ESRP amount
Jan	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Feb	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
March	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Apr	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
May	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]



IRS Penalty Notice

Form **14765**
(April 2017)

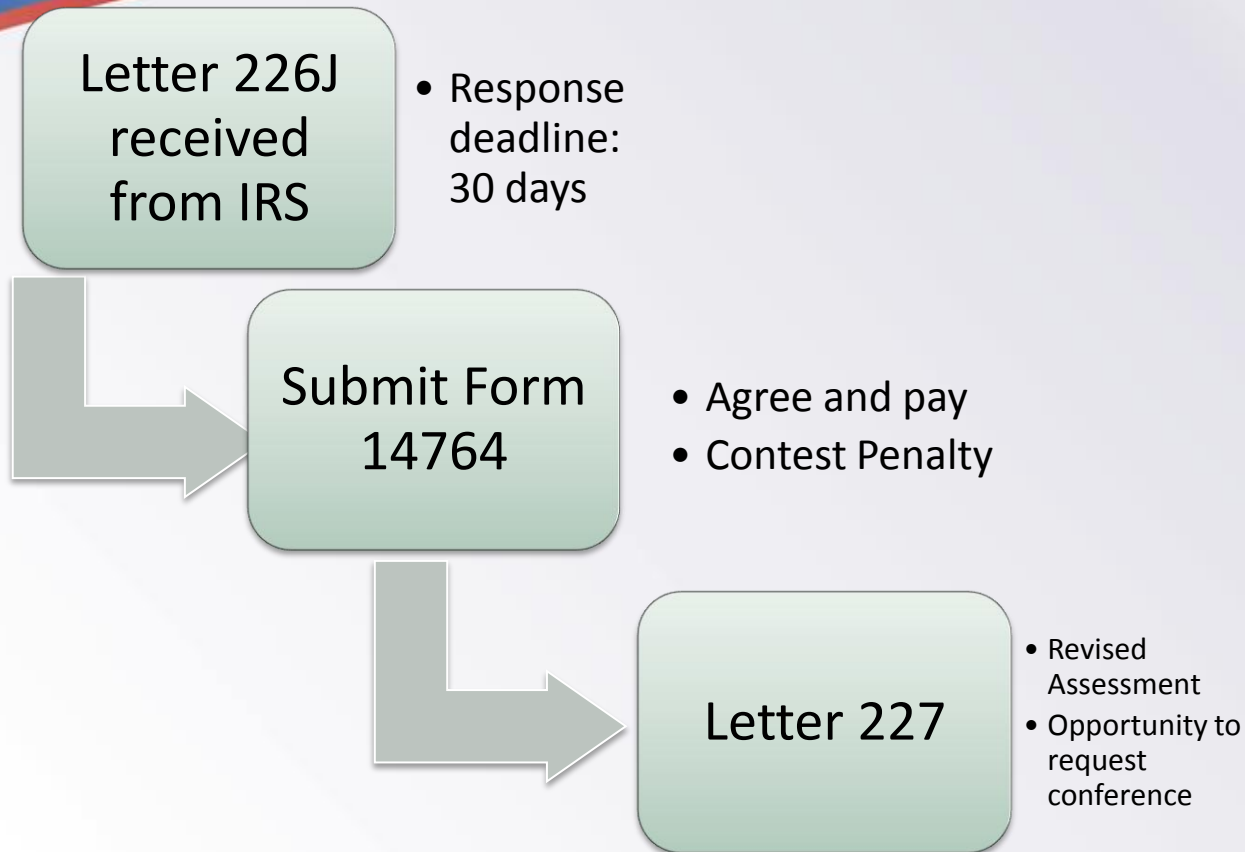
Department of the Treasury - Internal Revenue Service

Employee Premium Tax Credit (PTC) Listing

Any month not highlighted is a month that the employee received a PTC and no safe harbor or other relief from the ESRP was applicable. The employee is an assessable full-time employee for that month.

Employer name										Employer ID number			Tax year		
SAMPLE													2015		
Employee Name (last, first)	SSN (last 4 digits)	All 12 months Indicator Codes (Form 1095-C, lines 14 and 16 combined)	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Additional Information Attached
Lewy, Rachel	1234	1st row- filed	NoPTC	NoPTC	1H/2A	1H/2A	1H/2A	1H/2D	1B/2D	1B/2D	1B/2H	1B/2H	1B/2H	1B/2H	<input type="checkbox"/>
		2nd row- corr													
Slee, Malcolm	5678	1st row- filed	1B/2H	1B/2H	1B/2H	1H/2B	1H/2A	1H/2A	1H/2A	1H/2A	1H/2A	1H/2A	1H/2A	1H/2A	<input type="checkbox"/>
		2nd row- corr													
															<input type="checkbox"/>

IRS Penalty Appeal Process



Considerations in Responding

- 226J is not penalty assessment (Notice CP 220J is)
 - But, if you wait until you receive the 220J you've essentially conceded to penalty assessment
 - It's important to respond and (hopefully) object
 - Treat this as your only “bite at the apple” (even if that may not be the case)
 - Consider requesting pre-assessment conference

Considerations in Responding

- Most issues easily corrected
 - Most penalties result from typos
 - Examples:
 - Failure to select MEC indicator
 - Disconnect between payroll vendor and benefits professionals on measurement method used.
- Important first step is to obtain forms and information relating to year in question.

Considerations in Responding

- Do you need to engage attorney/CPA?
 - No, but it helps
 - Attorneys and CPAs can provide the full array of representation
 - But, anyone can be designated as a “power of attorney” on IRS Form 2848 (important first step)

Considerations in Responding

- Extension possible?
 - Yes.
 - No formal extension request process
 - Contact listed agent and request reasonable additional period of time.
 - **GET CONFIRMATION IN WRITING!**

Considerations in Responding

- Consider HIPAA privacy/ERISA 510 in responding
 - HIPAA only permits use or disclosure of PHI for certain permitted purposes
 - PHI can include enrollment status (depending on source of data)
 - It's unclear whether a HIPAA exception exists here
 - Be careful about source of information
 - ERISA Section 510 prohibits adverse employment action relating to benefits
 - Employers now have a listing of employees who triggered penalties
 - Consider Dave & Buster's case
 - Consider walling off information

Considerations in Responding

- Did the IRS follow the proper process?



QUESTIONS?

You may ask your question
in the questions box at any time.
Any questions that we do not answer
during the webinar will be posted on the
compliance corner webpage in the
coming weeks.

Questions?

Ben Conley
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