ACA Reporting Due in 2018

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Despite lots of talk and various attempts, the Affordable Care Act (ACA), has not been repealed, replaced, or even reworked. ACA remains the law, including the annual filing requirements using Forms 1094/1095 and the employer shared responsibility penalty provisions. Absent a last minute extension, reporting for the 2017 calendar year is due on or before **February 28, 2018, for paper filers**; on or before **March 31, 2018, for electronic filers**.

Why does reporting for the 2017 calendar year matter?

To date, compliance efforts with the annual reporting requirements have run the spectrum. Applying a cost benefit analysis to the situation, employers may have been comfortable with the risk of something less than "full" compliance. Some employers "chose" to not report; others reported but perhaps without too much concern regarding the quality of the information provided. After all, due to President Trump's Executive Order, no penalties were being imposed. **But the landscape is changing.**

Premium Tax Credits. The information reflected in the 2017 annual reporting will be used to evaluate the accuracy of the premium tax credits expended for the 2017 calendar year. ***Note:*** This purpose has nothing to do with the imposition of penalties.

The Math. The very large price tag to extend coverage to millions of people should not surprise anyone. Think for a moment regarding the subsidies provided through the Marketplaces across the country. What is the source of those funds? What was intended to be the source of those funds? As passed, the ACA has provisions that require expenditure and provisions that generate revenue. To date, the expenditures are going strong but without the corresponding revenue generation. This cannot continue. At some point, there need to be revenue streams to offset the expenditures. **The easiest means by which to produce those revenues is the one already in place – the employer shared responsibility penalties.**

The employer shared responsibility penalty provisions and annual filing requirements are not new. There is a fair degree of familiarity with the requirements. An entire industry has emerged to handle the annual filing requirements, the tracking and the monitoring, the penalty calculations. And, the draft forms and instructions for 2017 reporting contain very few changes. In other words, the mechanics are already in place and the systems are developed. Flip the switch and this significant revenue stream is operational.

So far, penalties have not been imposed pursuant to the Executive Order signed by President Trump on January 20, 2017, within hours of being sworn into office. To date and pursuant to that Executive Order, the employer shared responsibility penalties have not been imposed. How long can / should this continue? The full title of the Executive Order is "Minimizing the Economic Burden of the Patient Protections and Affordable Care Act Pending Repeal." The Executive Order was premised upon the Trump Administration's "prompt repeal of the Patient Protection and Affordable Care Act." The Executive Order describes what was to happen "pending repeal." It was intended to be transitional in nature; to bridge the gap until the ACA was repealed. At what point does the Executive Order outlive its purpose? And at what point does the need to generate revenues to cover the ongoing ACA costs outweigh the attempt to financially cripple the ACA's implementation?

With this changing landscape as the backdrop, let's revisit the most onerous of the two employer shared responsibility penalty calculations – Penalty A – where the ALE does not offer minimum value (MV) coverage to at least 95% of its full-time employees. To illustrate the harshness of the Penalty A calculation, consider the following two examples:

Example 1

ALE has 300 full-time employees for each calendar month of 2017.

Assume no full-time employees in a limited non-assessment period (LNP).

Employer does not offer MV coverage (e.g., does not offer coverage at all).

Penalty A is triggered because at least one full-time employee gets subsidized coverage through the Marketplace for each calendar month of 2017.

Calculation of Penalty A

Number of full-time employees (minus those in LNP) (minus 30)

300-0-30=270 full-time employees that count

Multiply by "applicable payment amount"

For 2017, annual applicable payment amount is $2,260; monthly amount is $188.33

Because ALE did not offer MV, Penalty A applies to each calendar month of 2017

270 x $2,260 = **$610,200**

Example 2

Same employer but employer offers MV coverage to 87% of its full-time employees for each calendar month of 2017.

Calculation of Penalty A

Number of full-time employees (minus those in LNP) (minus 30)

300-0-30=270 full-time employees that count

Multiply by "applicable payment amount"

For 2017, annual applicable payment amount is $2,260; monthly amount is $188.33

Because ALE did not offer MV to at least 95% of its full-time employees, Penalty A applies to each calendar month of 2017

270 x $2,260 = **$610,200**

HARSHNESS GENERATES REVENUES: The same penalty calculation applies in each example. With respect to Example 2, there is no offset or reduction for employees that (1) were offered coverage, (2) were offered coverage and took the coverage, or (3) were offered coverage, took the coverage, and received an employer contribution towards the cost of the coverage. And, the payment of the penalty by the employer is not a tax deductible business expense. **Harsh results; big revenues.**

Now consider the defined terms within the penalty formula: ALE, MV, full-time employee. Each definition presents multiple opportunities for misinterpreting or misapplying the definitions used for purposes of the annual filing 1094/1095 requirements and ultimately the determination of whether a penalty has been triggered and, if triggered, the amount of the penalty. Significant dollars are at issue in a time where significant costs require significant revenues. **The landscape is changing.**

Due Diligence Suggestions

Go back and review the basis upon which the ALE determination was made. ALE status includes employees that are less than full-time; it is based upon a full time equivalent (FTE) standard. Also remember that an employer's ALE status is made on a calendar year basis. Using the twelve calendar months of the prior year, the employer's status is determined and set for the following calendar year. Unlike penalty calculations, ALE status is ***not determined on a monthly basis***. Confirm the calculation for the 2017 calendar year was based upon the correct formula and using the correct information.

Go back and review the definition used to identify whether a particular employee was full-time for purposes of the annual reporting requirement. Remember that a full-time employee for other purposes, including eligibility for coverage under the medical plan terms, is not necessarily the same as full-time for purposes of the annual 1094/1095 filings. It is not as simple as determining the number of full-time employees offered the employer medical coverage, or actually taking the employer group medical coverage.

Go back and confirm the coverage offered, if any, was truly MV. In order for the employer coverage to "count," it must be MV. Not all group coverage is MV. Particularly with respect to self-insured medical plans with employer design flexibility, the overall coverage should be determined to be MV.

Re-evaluate outside service providers – consultants, software providers, etc. Do they adequately understand the nuances? Have they kept up with the regulatory agency guidance on reporting issues? For example, can the software accommodate non-calendar health plan year information in completing the calendar year 1094/1095 filing? And of course, what do the indemnification and hold harmless provisions in the services agreement say?

Document due diligence efforts. Should it be necessary to explain or justify what was done, documentation created at the time of the due diligence review will be very helpful.

Why? Because 2017 reporting matters.

Please contact us if you have any questions or would like assistance with a due diligence review.