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Recent Developments Regarding the Employer Mandate

Ed MacConnell | Total Benefit Solutions Inc. | (215) 355-2121 | edmac@totalbenefits.net

Applicable large employers (ALEs) may be resting easy, having had no notification from the IRS of 2015 or 2016 assessments under the Employer Mandate of the Affordable Care Act (the ACA) and having reasonably expected that the Republican-led administration would limit or choose not to enforce this mandate.

With the status of health care reform uncertain, the IRS has taken additional steps regarding the mandate, once again updating its website with FAQs on Employer Mandate penalties that build on information released in January (before the change in administration). Briefly, the guidance:

- Announced the 2017 inflation adjustments with respect to the annual Employer Mandate penalties: \$2,260 for the “A” penalty and \$3,390 for the “B” penalty.
- Provided examples of how the penalty assessment is calculated.
- Highlighted the process the IRS will use to notify employers of a penalty assessment and to collect the penalty.
- Reminded employers that any Employer Mandate assessment is not deductible for federal income tax purposes.

Recently, the Inspector General for Tax Administration in the Treasury Department issued an assessment of the agency's efforts to implement the Employer Mandate.

Results from this report include the following:

- As of October 28, 2016, the IRS processed 439,201 Forms 1094-C and 110 million Forms 1095-C.
- Some of the information contained in these reports did not process as intended, resulting in inaccurate and incomplete data.
- Reports submitted on paper were not processed timely and/or accurately due to system errors.
- Criteria used to validate errors in the submissions did not always work. For example, some error codes mistakenly generated when no error existed and, when errors did exist, codes reflecting the error did not generate.
- Systems needed to identify noncompliant employers subject to a penalty have been delayed as opposed to being initiated or cancelled. Specifically, a post-filing compliance validation system that was scheduled for release in January 2017 has been delayed until May 2017.

Finally, the IRS issued guidance lowering the 2018 safe harbor percentage for affordability to 9.56% versus 9.69% in 2017.

While the IRS made a general announcement that it is currently reviewing President Trump's Executive Order to determine implications for ACA compliance, this new information at least points in the direction that the government may begin enforcing the Employer Mandate.

The following provides additional detail.

The "A" Penalty

In general, an ALE member will owe this first type of Employer Mandate payment ("A" penalty) if, for any month, it does not offer minimum essential coverage (MEC) to at least 95% of its full-time employees (FTEs) (and their dependents), and if at least one FTE receives the premium tax credit for purchasing coverage through the Marketplace.

How is the payment calculated?

If an ALE member is subject to the "A" penalty, the annual payment is \$2,000 for each FTE (without regard to whether each employee received a premium tax credit), after excluding the first 30 FTEs from the calculation.

If the ALE includes multiple ALE members (i.e., multiple entities under common ownership), the 30-FTE reduction is distributed ratably across the controlled group based on each ALE member's number of FTEs.

The \$2,000 amount is indexed for inflation. The adjusted amounts are:

- For calendar year 2015, \$2,080
- For calendar year 2016, \$2,160
- For calendar year 2017, \$2,260

Even though the announced amounts are annualized, the IRS will determine whether an ALE member owes this payment on a month-by-month basis.

All FTEs except those in a waiting period factor into the payment calculation. Generally, part-time employees will not be counted.

Example 1. Employer is liable for the whole year.

Based on its number of FTEs in 2016, Company K is an ALE for 2017. Company K has 70 FTEs for each month of 2017. Company K does not offer MEC to its FTEs (and their dependents) for any month of 2017. One FTE obtains health insurance through the Marketplace and receives the premium tax credit for each month of 2017.

Because Company K does not offer MEC to at least 95% of its FTEs (and their dependents) for each month of 2017 and at least one FTE received the premium tax credit, Company K is subject to the “A” penalty.

For 2017, Company K is subject to an Employer Mandate payment of \$90,400, calculated as follows:

Number of FTEs less 30: $(70 - 30) \times \$2,260 = \$90,400$.

Example 2. Employer is liable for certain months.

Same facts as Example 1, except Company K does not offer MEC to its FTEs (and their dependents) for the first nine months of 2017. One FTE obtains health insurance through the Marketplace and receives the premium tax credit for each of those nine months. For the last three months of 2017, Company K does offer MEC to its 70 FTEs (and their dependents). No FTE receives the premium tax credit for the last three months of 2017.

Because Company K does not offer MEC to at least 95% of its FTEs (and their dependents) for the first nine months of 2017 and at least one FTE received the premium tax credit for those months, Company K is subject to the “A” penalty for the first nine months of 2017.

Because Company K does offer MEC to at least 95% of its FTEs (and their dependents) for the last three months of 2017, Company K is not subject to the “A” penalty for the last three months of 2017. Company K also is not subject to the “B” penalty for the last three months of 2017 because no FTE receives the premium tax credit for the last three months of 2017.

For 2017, Company K is subject to an Employer Mandate payment of \$67,800, calculated as follows:

Number of FTEs less 30: $(70 - 30) \times 9/12 \text{ of } \$2,260 = \$67,800$.

The “B” Penalty

Even if an ALE member offers MEC to a sufficient number of FTEs (and their dependents) to avoid the “A” penalty, the ALE may still owe the second type of Employer Mandate payment for each FTE (if any) who receives the premium tax credit for purchasing coverage through the Marketplace (“B” penalty).

An FTE could receive a premium tax credit if the:

1. MEC the ALE offers to the FTE is not affordable; or
2. MEC the ALE offers to the FTE does not provide minimum value; or
3. FTE is one of the 5% of FTEs not offered MEC.

How is the payment calculated?

If an ALE owes the “B” penalty, the annual payment is \$3,000 for each FTE who received the premium tax credit.

The \$3,000 amount is indexed for inflation. The adjusted amounts are:

- For calendar year 2015, \$3,120
- For calendar year 2016, \$3,240
- For calendar year 2017, \$3,390

Even though the announced amounts are annualized, the IRS will determine whether an ALE member owes this payment on a month-by-month basis.

The total amount of the “B” penalty cannot exceed the amount that the employer would have owed had it been liable for the “A” penalty.

Example 3. Employer is liable for employer mandate payment for failure to offer minimum essential coverage that provides minimum value.

Based on its number of FTEs in 2016, Company M is an ALE for 2017. Company M has 125 FTEs for each month of 2017. For 2017, it offers MEC to its FTEs (and their dependents), but the MEC is not affordable for all of the FTEs.

Fourteen of its FTEs obtain health insurance through the Marketplace and receive the premium tax credit for each month of the year.

Because Company M offers MEC to its FTEs (and their dependents), it is not subject to the “A” penalty for any month of the 2017.

Company M is subject to the “B” penalty for each month of the year because for each month of the year, at least one FTE received the premium tax credit. Company M is subject to an Employer Mandate payment of \$47,460, calculated as follows:

Number of FTEs who received the premium tax credit for each month of the year (14) x \$3,390= \$47,460.

The basic calculation amount of \$47,460 is the Employer Mandate payment amount for Company M for 2017.

Assessment and Collection of the Employer Mandate Payment

Employers do not automatically report or pay an Employer Mandate payment they owe. Instead, based on information from the employer and from employees’ tax returns, the IRS will calculate the potential Employer Mandate payment and contact the employer to inform it of any potential liability. The employer will then have an opportunity to respond before any assessment or demand for payment is made.

An employer will not be contacted by the IRS regarding any penalty assessment until after its employees’ individual income tax returns are due for that year which would show any claims for the premium tax credit.

If, after the employer has had an opportunity to respond to the initial IRS contact, the IRS determines that an employer is liable for a payment, the IRS will send a notice and demand for payment to the employer. That notice will instruct the employer how to make the payment.

The IRS will adopt procedures to ensure that employers receive certification when one or more employees receive the premium tax credit for purchasing coverage through the Marketplace.

Employer Action

ALEs should:

- Prepare to address notifications of a potential penalty assessment from the IRS. Likely, any notices associated with the 2015 calendar year would be issued first, with 2016 notices coming after tax filing season closes.
- Continue to comply for the 2017 calendar year, including continuing to identify and track offers of coverage to FTEs for calendar year 2017 and preparing for reporting on Forms 1094-C and 1095-C.
- Monitor political developments as Republicans in the House passed health care reform legislation which, among other things, zeroed out penalties associated with the Employer Mandate from 2016 forward. The Senate leadership indicates that they will craft their own solution, so further uncertainties with regard to penalties remain.