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ACA Shared Responsibility Reporting: The Key to IRS's Penalty Tax Assessment and the Data Key to the Employer's Defense

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In order for the Patient Protection and Affordable Care Act (ACA) to actually expand health coverage to cover more persons, Congress enacted a couple of carrots, some sticks and of course more reporting requirements to make the carrots and sticks work. The expansion of coverage is incentivized by the individual mandate penalty and the employer shared responsibility penalty—so individuals are penalized if they don't buy coverage and employers are penalized if they don't offer coverage that is both affordable and that provides minimum value.

This article focuses on the stick side of the equation and how the Internal Revenue Service plans to administer the enforcement of the sticks through employer reporting requirements to both employees and to the IRS, which will then be compared with the individual tax returns ultimately resulting in IRS assessments of the shared responsibility penalty on employers. Employers then need to be prepared to defend such assessments based upon records of coverage offered, who is a full-time employee and if the coverage the employer offered was affordable.

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The reporting requirements will also be used by the IRS to administer the carrot side of the equations to determine which individuals should be eligible for a premium tax credit for coverage purchased on one of the Marketplaces. Thus, the reporting requirement on the employer also requires the employer to provide information used to determine this eligibility.

In gathering the information used to comply with the reporting requirements, employers should consider that some information may not be necessary now, but may be required in future years if an employer wants to change reporting methods.

The Shared Responsibility Penalty

In order to encourage applicable large employers (ALEs) to continue to offer health coverage to employees, the ACA included a penalty structure that it called the shared responsibility penalty. If an ALE's health plan provides minimum value, is affordable and is offered to all full-time employees, the ALE may not be assessed a shared responsibility penalty if the ALE can demonstrate how it meets all of these requirements.

Thus, it is important for an ALE to analyze the employer shared responsibility penalty requirements for determining full-time status and affordability and the related reporting requirements as part of the ALE's overall strategies to preserve records to help the ALE

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defend itself against assessment of the employer shared responsibility penalty and minimize its tax exposure.

Section 6056 Reporting

The IRS needs to have certain information regarding the coverage offered, its cost and who had such coverage so it can administer the health care tax credit under tax code Section 36B and the employer shared-responsibility penalty under Section 4980H.

The reporting required under tax code Section 6056 is designed to provide such information and uses many of the terms defined in Section 4980H and the regulations thereunder, which makes sense because Section 6056 requires reporting of the data needed for the IRS to assess the Section 4980H penalty and determine if an employee was offered coverage with minimum value that was affordable.

The Section 6056 regulations, which focus on the reporting the IRS needs to assess the Section 4980H penalties, borrow the Section 4980H definitions for:

- applicable large employer,
- applicable large employer member,
- dependent,
- eligible employer sponsored plan,
- full-time employee,
- governmental unit and agency or instrumentality of a governmental unit,
- minimum essential coverage,
- minimum value,
- person.

The filing requirement applies to an ALE member in the same way that the shared-responsibility tax is calculated based upon each ALE member's records. ALE members who don't have any employees aren't required to file under Section 6056.

Employers that fail to comply with the Section 6056 reporting requirements are subject to the penalties under Section 6721 (failure to file correct returns). Failure to provide the correct information returns is subject to the penalty under Section 6722. However, the penalties can be waived or abated if the failure to file or provide the information returns is due to reasonable causes.

ALE Members must file a Form 1095-C for each individual to whom minimal essential coverage is provided. For the Forms 1095-C required to be filed or furnished in 2016 for 2015 coverage, the IRS won't impose a penalty if the ALE Member made a good faith effort to comply with the Section 6056 information reporting requirements. However, no relief is available for an ALE Member who fails to file, only for incomplete filings. Both the information under Section 6056 and 6055 are reported on the same Form 1095-C.

Self-Insured Plan Reporting

The reporting requirements under Section 6055 are intended to facilitate the IRS's administration of Section 5000A—the individual mandate—by reporting which individuals had minimum essential coverage in each calendar month during a year and to help individuals file their federal income tax return regarding whether the individual maintained minimum essential coverage.

Under Section 5000A, coverage of only one day in a calendar month counts as a full month of coverage. So when insurers and self-insured plans provide coverage, they must complete Form 1095-C or 1095-B to report when they provide minimum essential coverage to the employee and for the coverage for each covered dependent.

The requirements include reporting the employee's name, tax identification number (TIN) and address. If a federal TIN isn't provided at the initial request, the employer must make a second request for the TIN, and for each covered dependent, their name, TIN or date of birth. For the dependent's TIN, the employer must make two requests each year. No penalty will be assessed as long as the TIN is requested at initial enrollment and a follow-up request is made by December 31 of the year in which the relationship commenced. Each annual enrollment is treated as an initial solicitation, thus it appears there may be an annual pair of solicitations for a dependent's TIN. Reporting a birth date for a dependent doesn't excuse an employer from making the initial and follow-up request for the dependent's TIN.

> ***Practice Tip:*** As employers plan for open enrollment for the 2015 plan year, they need to implement the steps to gather the TINs of each employee and dependent as part of the open enrollment and also to follow up with a second request to anyone who doesn't provide the information during the open or initial enrollment.

The reporting requirement applies to all common-law employees but it doesn't apply to statutory employees. Reporting is only required for employees who enroll in coverage offered by the employer on Form 1095-C.

TINs reported can be truncated on the statements sent to individuals, but not on the Forms 1095-C sent to the IRS. Forms 1095-C can be mailed with the Form W-2 to employees. The Form 1095-C must report the coverage months for each employee and each covered dependent using one day of coverage in a calendar month qualifying as coverage for that full month in minimum essential coverage.

2015 Requirement. While employers *may* report coverage provided in 2014, they *aren't required* to report coverage provided for 2014 under Section 6055. However, beginning in calendar year 2015, each month of coverage provided in 2015 will be *required* to be reported in 2016. If this was the only rule for reporting a month of coverage, the reporting would present challenges for pulling together the information due to obtaining dependents' TINs and the conversion of one day

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of coverage into a month of coverage. But it is more challenging because the next reporting requirement only treats employees as offered coverage for a month if they are offered the coverage every day in the calendar month to be treated as covered.

Caution: One day of coverage equals a month of coverage reported under Section 6055, but this contrasts with the reporting for Section 6056 on the same form, which treats one day of coverage missed during a calendar month as no offer of coverage for such month except in special circumstances such as termination of employment.

Reporting and the Employer Mandate

For each choice between one of the flexible alternatives provided under Section 4980H, 6055 or 6056, there are many restrictions that also apply and must be considered. There are also a number of conditions related to which rules apply. The documentation of who is a full-time employee will also determine for which employees the employer will be required to report based on the proposed regulations on reporting.

Many payroll and HRIS systems don't capture and retain the hours worked by employee by month. If this data isn't captured and preserved, the ALE loses its ability to defend the assessment of the shared responsibility penalty based on the individual not being a full-time employee. If this data is captured, the ALE retains the ability to use that defense regardless of whether the ALE uses the monthly method or lookback/stability period method of determining full-time status because both use hours worked per month as the bottom line common starting point for their determination.

Practice Tip: Even if an employer decides to use one of the alternative methods of complying with reporting to avoid determining full-time status in one year, the preservation of the data permits an employer to change methods in future years if it's not able to continue to meet one of the alternate or safe harbors in a future year (e.g., if the ALE can no longer subsidize coverage so that the employee only pays 9.5 percent of the federal poverty level as the employee only premium).

Information in Different Systems. The reporting regulations on health care coverage under the ACA are critical because they require pulling information that is often housed in different systems. For example, information on to whom coverage is offered and the premiums at which coverage providing minimum value is offered for particular months may be contained in the HRIS system, while the hours worked may be contained in a payroll system for determining full-time status. Employers must also get the social security numbers of dependents and spouses, which is information that most employers don't have.

Practice Tip: Reporting may require employers to solicit new information, pull information from separate computer systems and combine the new data with the data pulled from different systems into one report for the IRS and another statement sent to full-time employees.

Conflicting Coverage Requirements

The Section 4980H regulations also require employers to offer coverage to those employees qualifying as full-time by the first day of the fourth month after the end of the measurement period to avoid the Section 4980H penalty for the first three months after the measurement period ends.

If an employer fails to offer coverage to a full-time employee on any day during the month, that employee is treated as not offered coverage for the entire month and thus the employer is subject to the failure to offer coverage penalty for that employee for that month under the Section 6056 reporting that adopts the Section 4980H definitions. The Section 4980H definition of full-time employee is used as the definition of such term in Section 6056.

This contrasts with the individual mandate penalty, which employers can avoid, if they have coverage for just one day in a calendar month. The employer must also report one day of coverage as a month of coverage under the Section 6055 regulations, even though the employer can't treat such same day of coverage as a month of coverage to defend itself against the assessment of the ''pay or play'' penalty with respect to offering coverage to the same individual. This may require some very good system programming.

However for January 2015 only, if the employer offers the employee coverage by the first day of the first payroll period in January 2015, the employer will be treated as offering coverage for the entire month.

The fact that one day of non-coverage can expose the employer to the penalty for the entire month may cause employers to rethink plan provisions regarding when coverage terminates for an employee or dependent and when coverage is added for the employee or dependent for a change in status or special enrollment period.

Caution: Employers need to consider how the cafeteria plan rules regarding the effective date of changes due to changes in status and special enrollment rights, and the date coverage is effective for such changes, mesh with the ACA rule that a day of missed coverage means no coverage for the month. Employers should consider the cost of extending coverage as compared to the penalty cost for not providing coverage for a month.

An employer might consider extending coverage to the end of the month for all coverage terminations occurring mid-month to be able to simplify the reporting so it shows that the employer offered coverage for the full month and provided coverage for the same full month. But the employer should also consider that for coverage lost due to termination of employment mid-month, where the coverage would have extended to the end of the month and the employee would have been offered coverage to the end of the month if employment had continued, the employee is treated as being offered coverage for the full month and thus no extension is necessary for such mid-month coverage terminations to report the offer and the coverage the same way for that month.

The employer may only need to consider extending coverage from a mid-month loss of coverage for a reason *other* than the employee's termination of employment to get those mid-month coverage terminations treated the same for reporting and for programming the system to generate the Form 1095-C. Extending coverage for employees' and dependents' mid-month coverage losses other than the employees' loss due to termination of employment would lead to all employees' and dependents' mid-month coverage ending events not causing the employer to pay a shared responsibility penalty for such individual for such month.

Reporting Relief

In an effort to make the reporting under Sections 6055 and 6056 easier for ALE self-insured health plans, the IRS is permitting the information under both sections to be reported on Form 1095-C by completing different portions of the form. The Form 1095-C must not only be filed with the IRS, but it also must be furnished to the full-time employees. No transitional reporting methods or alternatives were included in the final regulations under Section 6055, only that Section 6055 reporting wasn't required for calendar year 2014 and no penalties would be imposed for that year.

The reporting required under Section 6056 can be done under either the general or alternative method. The employer may use the general method for all employers and for any or all of its full-time employees and may use the alternative method for those employees who qualify. The information must be reported on and to each full-time employee of one of the ALE Members. If the alternative method isn't available for some group or groups of employees, the employer must use the general method for such groups of employees.

General Reporting Method. The information that must be reported under Section 6056 and the final regulations are:

- name, address and EIN of the reporting ALE Member and the calendar year for which the information is reported;
- name, address and telephone number of the contact for the ALE Member who can be an employee, agent or other party acting on behalf of the ALE Member;
- a certification as to whether the ALE Member offered its full-time employees and their dependents the opportunity to enroll in coverage constituting minimum essential coverage by each calendar month;
- the number of full-time employees for each calendar month during the year;
- for each full-time employee, the months during the calendar year for which minimum essential coverage under the plan was available;
- for each full-time employee that employee's share of the lowest cost monthly premium for self-only coverage providing minimum value that was offered to such full-time employee under the plan; and
- the name, address and TIN of each full-time employee during the calendar year and the months, if any, during which the employee was covered under an eligible employer-sponsored plan.

The final regulation dropped the requirement that the TIN of the spouse and each dependent also be included for Section 6056 reporting, but retained the requirement for Section 6055 reporting. In addition to the above seven types of information reported, additional information will be reported via the use of codes on the forms. The additional information that is reported via codes includes:

- whether the coverage offered to full-time employees and their dependents provides minimum value and whether the employee's spouse was offered coverage;
- the total number of employees for each calendar month;
- whether the employee's effective date of coverage was affected by a permissible waiting period by calendar month;
- whether the ALE Member had no employees or credited hours of service to any employee during the calendar month;
- whether the ALE Member is a member of a controlled group under Section 414(b), (c), (m) or (o) and if such a member, then the name and EIN of each employer member of such ALE who was a member on any day of the calendar year being reported;
- if the ALE Member is a contributing member to a multiemployer plan, whether with respect to a full-time employee, the employer is not subject to an assessable penalty under Section 4980H due to the employer's contributions to a multiemployer plan;
- if an ALE appropriately designated person is reporting on behalf of an ALE Member that is a governmental unit or any agency or instrumentality thereof, the name, address and identification number of such appropriately designated person; 193 and
- if a third party reports for an ALE Member with respect to its full-time employees, the name, address and identification number of the third party (in addition to the same information on the ALE Member).

Further, each calendar month of coverage reported for a full-time employee will carry with it codes for each month indicating whether coverage with minimum value was offered and to whom it was offered, or if coverage wasn't offered, why it wasn't offered, or if coverage was offered to a person who didn't qualify as a full-time employee, whether the employee was covered and if the coverage was affordable.

> ***Practice Tip:*** For the 2015 year, the Form 1095-C must be filed with the IRS by March 1, 2016 (March 31, 2016, if electronically filed) and must be furnished to full-time employees by Jan. 31, 2016.

Alternative Reporting Methods. *Reporting Based on Certification of Qualifying Offers*. Simplified reporting is permissible for certain ALE Members if the qualifying ALE Member certifies that it offered certain coverage to one or more of its full-time employees. With this simplified reporting also comes simplified statements to be provided to the full-time employees who received an offer of coverage for each of the 12 calendar months.

The ALE Member must certify that it offered coverage providing minimum value to all of its full-time employees and their spouses and dependents with the cost for employee-only coverage not in excess of 9.5 percent of the federal single poverty level for the 48 contiguous states and D.C. However, this alternative method to comply with the Section 6056 reporting requirement doesn't apply if the transition relief related to offering dependents coverage in 2015 is used.

Using this alternative method for Section 6056 reporting requires the ALE Member to issue a statement to the employee that he and his dependents don't qualify for the premium tax credit, and it doesn't relieve the employer from complying with the Section 6055 reporting requirements.

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Reporting Based on Qualifying Offers in 2015. For 2015, an ALE Member may use an alternative method similar to the general method above if it files with the IRS the Form 1095-C providing the employee's name, social security number and address and indicates using the indicator codes that the qualifying offer was made for all 12 months or the specified months for which it was made and provides a statement with such details to the employee.

To use this alternative reporting method for Section 6056 reporting, the ALE Member must certify that it made the qualifying offer in X.A. of the to full-time employees, spouses and their dependents and that in lieu of providing Form 1095-C to its employees, it satisfies the Section 6056 requirements with respect to full-time employees by furnishing a statement to each full-time employee by January 31 of the year for which the statement is provided.[1] Use of this alternative method of reporting for Section 6056 doesn't relieve the ALE Member from its reporting obligation under Section 6055.

The 98 percent offers rule. An employer can report without separately identifying its full-time employees if certain conditions related to offers of coverage are met. If an ALE Member satisfies this alternative reporting method's requirements, the ALE Member isn't required to report under the Section 6056 reporting either the number of full-time employees it has or whether any particular employee was a full-time employee for any calendar month during the year.

The employer still must report on the employees, it just doesn't have to specify which were in full-time status. This works for an employer who offers minimum value coverage to all of its full-time employees but may have missed a few employees as long as the ALE Member offered coverage providing minimum value that was affordable (employee-only under any applicable 4980H affordability safe harbor) and it can certify it offered such coverage to at least 98 percent of its employees (regardless of whether they are full-time employees) for whom it reports under Section 6056 for Treas. Reg. § 301.6056-1(j)(2). Penalties for failure to report under Section 6721 (failure to file a correct return) and 6722 (failure to provide correct information returns) still apply.

Reporting for ALE's with Fewer than 100 Full-Time Employees. For ALE's with at least 50 and fewer than 100 full-time employees and who qualify for transition relief under the final regulations under Section 4980H, there is a special rule for 2015 providing relief from the Section 6056 reporting requirement. Such employers must certify on its Section 6056 transmittal form for 2015 (that it will file in 2016) that they meets the eligibility requirements in XV.D.6.(a)(1) through (3) of the preamble to the final Section 4980H regulations.[2]

Practice Tip: It appears that this certification is all that is required, but the preamble didn't specify the relief that was provided—presumably it is relief from the requirement that employers furnish the Form 1095-C to the employees.

Combinations of Reporting Methods

An ALE Member may use alternative reporting methods for particular groups of employees that in many cases wouldn't be identical at the employers election as permitted in the instructions and forms.

95 percent Safe Harbor/Transition Rules for the Penalty Tax and Related Alternate Rule for Reporting on Coverage Offered. The penalty tax regulations included a safe harbor permitting an employer to avoid the penalty for failure to offer coverage if the employer met the safe harbor by offering affordable coverage to all but 5 percent of its employees, or if greater to all but 5 employees.

This safe harbor is expanded *for 2015* to permit employers to avoid the penalty tax under Section 4980H(a) for failure to offer affordable coverage if the employer offers affordable coverage to all but 30 percent of its full-time employees, or it offers affordable coverage to at least 70 percent of its employees as of the first day of the 2015 plan year. In this case, no 4980H(a) penalty applies for the months in the plan year during calendar year 2015. This expansion of the safe harbor applies for 2015 if certain other requirements are satisfied.

If an employer uses this safe harbor with respect to avoiding the penalty tax, there is an alternative method to comply with the reporting requirements related to offers of coverage by certifying that at least 95 percent of its full-time employees, spouses and dependents were offered coverage, and if this certification is made, the employer may instead of providing Form 1095-C to all of its full-time employees, provide to each of its full-time employees a statement to be defined in the instructions to the form regarding whether the employee received a qualifying offer of health coverage for all, some or none of the months, and if less than all, for which months, along with other information. Note this statement is still required to be provided to only full-time employees. This reporting alternative is available for 2015 as an optional method.

95 Percent Safe Harbor Rule for the Penalty Tax Combined with the 98 Percent Alternate Reporting Rule. However, if the 95 percent safe harbor from the shared-responsibility penalty tax is combined with the 98 percent safe harbor reporting relief (explained below), the ALE Member can avoid determining whether any particular employee is a shared-responsibility penalty tax ''full-time employee'' until an employee goes to the exchange and gets a premium tax credit and the IRS assesses a penalty tax on such individual. At the time of such assessment, the employer must then be able to either determine if the individual wasn't a full-time employee or it must pay the assessed penalty tax.

It is important to remember that even if the employer uses this safe harbor to avoid imposition of the Section 4980H(a) penalty for failure to offer coverage, it still may be subject to the penalty under Section 4980H(b) when an employee seeks coverage from the Marketplace and obtains a premium tax credit if the employer's coverage is either not affordable or doesn't provide minimum value. The employer then must be able to pull the data to defend itself against the penalty tax. The reporting regulations related to the offer of coverage included a new temporary safe harbor to avoid certain portions of the reporting requirements, but no relief was provided for the penalty tax, if the employer offered coverage to 98 percent of all employees; however, this provides relief from a portion of the reporting requirement on Form 1095-C and doesn't negate all of the reporting requirements, nor does it fully eliminate the need to determine which employees are full-time.

[1] 79 Fed. Reg. 13231, 13241 X.A.2. (March 10, 2014); Treas. Reg. § 301.6056-1(j)(1).

[2] 79 Fed. Reg. 13231, 13242-3, 13242-13243 X.C. (March 10, 2014).

If the individual uses only the 98 percent safe harbor for reporting relief, it will not exempt the ALE Member from any penalties if it failed to report on a full-time employee.

Practice Tip: The 98 percent safe harbor rule may provide some temporary relief and it delays determining full-time status until contacted by the IRS, but at that contact, the ALE Member must be able to either prove the individual was not a full-time employee based upon its records of hours worked, or it must pay the applicable shared responsibility penalty and the penalties for failure to report on the full-time employee.

Concluding Thoughts

While ALE's and the individual ALE Members determine their strategies for minimizing the employer shared responsibility penalty tax, they should consider not only how to address this issue for 2015, but also how changes in future years may require the collection and preservation of data so that the ALE and its ALE Members have the flexibility in future years to change methods.

For example, an ALE may decide that it and its members won't collect or preserve data on hours worked per month because it is using the 95 percent safe harbor on offering coverage, the federal poverty level or rate of pay safe harbors for affordability, and the 98 percent alternative reporting rule so it doesn't have to capture or determine who is a full-time employee for purposes of the shared responsibility penalty tax or reporting under Section 6056. However, the ALE may then find itself regretting that decision in future years if the business no longer supports subsidizing the employee's premium to the extent to automatically satisfy the affordability requirement because it won't have the data collected to defend itself against the assessment of the shared responsibility penalty based on whether any particular employee is a full-time employee for the shared responsibility penalty tax.

Saving on programming and data retention costs initially may later be outweighed by the penalty costs for the months before the records necessary for the defense of the penalty can be obtained by programming after the fact.

ALEs need to consider the options and what strategies will work best for the ALE to minimize its tax exposure for the employer shared responsibility penalty tax over time. The use of some of the alternative methods in a current year without data preservation may prove a costly decision resulting in loss of flexibility to respond to changes in the business environment requiring cost cutting in benefits in future years.

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