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## Pushing back on proposed ACA penalties - Part 2 - by Michael Duffy

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Although this limitation puts the possibility of an assessment out of the hands of an employer, the Obamacare subsidy requirement is an important limitation on the IRS's power to impose the ESRP penalties. All 226-J Letters will contain a breakdown of the individual employees that received Obamacare subsidies during each month of the tax year. If one employee received Obamacare subsidies for a particular month, a 1/12 fraction of the ESRP annual penalty is assessed for that month, assuming the employer also did not offer adequate coverage options.

Chaotic Reporting: For large employers, the number of full-time employees can fluctuate as additions and subtractions are constantly being made from payroll. Employers should obtain waivers from any employee declining coverage to ensure if they later apply for Obamacare through an ACA exchange that they do not erroneously receive any subsidies. Reporting issues can also arise when variable hour employees begin averaging more than 30 hours per week, as the ACA considers these employees to be employed full-time.

As such, complying with the ACA involves tracking and actively monitoring a good deal of employee data on a monthly basis. This significant burden is substantially compounded, however, by the complexity of reporting all of the relevant data to the IRS. The Forms 1094-C and 1095-C are difficult to understand and the instructions are filled with jargon. For instance, on Form 1095-C, employers must populate for each separate employee and each month one of eighteen different letter codes denoting employment status, status of coverage offers, and affordability data. Some letter codes combine multiple statuses into one field, whereas other employee statuses material to the employee's access to coverage, such as whether he or she has waived employer-sponsored plan participation, contain no separate letter code at all.

The confusing format of Forms 1094-C and 1095-C is in all likelihood a material factor in generating

a significant number of the 226-J Letters currently being sent out by the IRS. In some cases, an employer receiving one of these letters may simply be able to correct reporting errors and avoid an ESRP penalty altogether.

Flawed Assessment Process? Employers aren't the only ones having difficulty getting their ACA compliance right. The IRS has additionally struggled with meeting the standards required to impose the ESRP penalties. In particular, the 226-J Letter process currently in place cuts an important corner.

Recall that an ESRP penalty may not be assessed against an employer unless at least one of the employer's full-time employees is also enrolled in a subsidized Obamacare plan. The ACA requires that an employer receive something called "Section 1411 certification" confirming one of its employees has enrolled in such a plan and was allowed a subsidy before any penalty may be assessed.

ACA regulations created by the Department of Health and Human Services in 2013 set forth how the Section 1411 certification process is supposed to work. The regulations provide that an employer is supposed to receive notice from an ACA exchange when one of its employees applies for subsidized Obamacare coverage. The notice gives employers an opportunity to challenge any incorrect assertions made by employees on their Obamacare applications, such as he or she erroneously claiming they were not offered employer-sponsored coverage, or that the coverage offered by an employer is not affordable. The process further alerts employers that their penalty exposure may grow if they do not begin offering ACA-compliant benefits to enough of their employees. Presumably, if the potential ESRP exposure is high enough, an employer in receipt of a Section 1411 certification may reasonably opt to expand their healthcare plan offerings.

In reality, the ACA exchanges more often than not never issued any notices to employers. These failures significantly limited the opportunities of employers to contest erroneous employee claims, but perhaps more critically appear to fall short of the Section 1411 certification requirement.

The IRS has attempted to gloss over the fact that the ACA exchanges in many cases did not issue valid Section 1411 certifications by stating in the text of the standard 226-J Letter that the letter itself represents a Section 1411 certification. This statement is not consistent with the ACA's regulatory framework, though, and potentially impacts the IRS's ability to legally impose the ESRP penalties on employers.

### Responding Aggressively

The failure of the ACA exchanges to send timely Section 1411 certifications to employers and the complexity of ACA information reporting makes responding to 226-J Letters challenging. Employers receiving 226-J Letters need to be prepared to provide detailed records to the IRS and push back on the specifics of each and every employee that may have enrolled in an Obamacare plan and claimed subsidies. Pushing back effectively means showing that the 95% offer-of-coverage threshold was met, that all employees who enrolled in Obamacare were not actually entitled to receive subsidies, or potentially arguing that the 226-J Letter does not constitute a valid Section

1411 certification.

If you've received a 226-J Letter threatening a large ESRP penalty, it is highly advisable you obtain representation that has familiarity with ACA parlance and compliance procedure. The reality right now is that the ACA is still here to stay and while it is in effect the IRS will not stop looking for easy ESRP penalty targets.

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